[redacted]

TABLE OF CONTENTS.

PAGE

PRELIMINARY STATEMENT—THE FEDERAL QUESTIONS INVOLVED 1

ASSIGNMENTS OF ERROR 5

STATEMENT OF FACTS 6

THE CONNECTICUT STATUTE INVOLVED 12

ANALYSIS OF THE CONNECTICUT DECISION 12

POINT I—The real complaint of the petitioner in No. 190 is directed to the determination of the Connecticut court that the Liberty Bonds, Treasury Certificates and cash on hand were in the nature of tangible personal property. This was a question of local law, with the decision of which this court has no concern. The decision on the federal question that the succession to tangible personal property physically situated outside Connecticut cannot constitutionally be taxed by that state follows the rule of this court 16

POINT II—The Liberty Bonds and Treasury Certificates payable to bearer and the cash on hand owned by the decedent were tangible in their nature. Since they were located outside the State of Connecticut at the time of his death, the Connecticut statute purporting to levy a tax on their transfer or succession thereto was unconstitutional and void 21

Bonds 22

Cash on Hand 25

Conclusions 25

251549

PAGE

POINT III—The statute of the State of Connecticut purporting to levy a tax on the succession to the intangible property, other than the Lassner account receivable and the stock of a Connecticut corporation, owned by the decedent at the time of his death, violates the 14th Amendment to the Constitution of the United States by taking property without due process of law 27

1. The succession to all of the intangible property involved in these appeals took place under and by virtue of the laws of the State of New York and the action of its courts, without any aid from or intervention by the laws or the courts of the State of Connecticut 32

(a) Under the statutes of the State of New York, the Surrogates' Court for New York County is authorized to take jurisdiction of and administer property of a non-resident decedent within the state... 32

(b) The property located within the State of New York which the New York Surrogates' Court will administer includes all of the intangible property, a tax on the succession to which is involved in these appeals 41

(c) The Surrogates' Court for New York County has taken and will retain original jurisdiction for the probate of the decedent's will in this case and the administration of all of the decedent's property, a tax

PAGE

on the transfer of which is involved in these appeals, and the executors have proceeded with the administration of all these assets solely under the jurisdiction and authority of the State of New York 43

(d) The law and the courts of the State of Connecticut do not aid and cannot interfere with the transfer of or succession to the property involved in these appeals..... 50

(e) The general rule of law and the usual policy throughout the United States is in accordance with the rule and policy of New York..... 57

2. The situs of the property involved in these appeals, for the purpose of determining where its transfer was accomplished, was exclusively in New York..... 59

(a) The meaning of situs..... 62

(b) Situs of intangible property fixed by the element of control at a point other than the owner's domicile is recognized by the law for many purposes, including the exercise of the power of taxation..... 67

(c) The situs of the property in Connecticut depends on the maxim *mobilia sequuntur personam.* The history and purpose of this fiction and its place in the law..... 73

(d) Development of the law of situs for taxation. The shift from *lex domicilii* to *lex situs*..... 79

PAGE

(e) The situs of the property involved in these appeals is, for the purpose of this case, exclusively in the State of New York 103
Partnership 104
Insurance and Bank Account .. 105
Stock 106

3. Other elements in the theory of taxation: Protection; certainty of discovery 107
4. Summary. The attitude of the courts toward changing conditions and growth of the law. 113

POINT IV—The attempt of the State of Connecticut to tax the succession to the property involved in these appeals denies full faith and credit to the public acts, records and judicial proceedings of the State of New York, in violation of Article IV, Section 1, of the Constitution of the United States ... 118

POINT V—The decisions of this court deny the right of the petitioner in No. 190 to appeal from the decision of the Connecticut court 120

CONCLUSION—In No. 190 the writ of certiorari should be dismissed, or, in the alternative, the judgment of the Connecticut court should be affirmed. In No. 191 the judgment of the Connecticut court should be reversed 121

TABLE OF CASES, STATUTES AND AUTHORITIES CITED.

A

PAGE
Adams v. Phelps, 16 Conn. 127.....59, 67, 70, 119
Attorney General v. Glendining, 92 L. T. N. S. 87... 23

B

Baker v. Baker, Eccles & Co., 242 U. S. 394.....
58, 70, 107, 119
Barber v. Morgan, 84 Conn. 618..... 69
Beale:
Progress of the Law, 1923-1924—Taxation, 38 Harv. L. R. 281.....94, 103
Situs of Things, The, 28 Yale L. J. 525.....67, 77
Validity of Inheritance Taxation Measured in Part by Value of Foreign Personalty, 39 Harv. L. R. 250..... 94
Beers v. Shannon, 73 N. Y. 292..... 43
Berry v. Windham, 59 N. H. 288.....72, 94
Billinghurst v. Spink County, 5 S. D. 84.....72, 87
Blackstone v. Miller, 188 U. S. 189.....
22, 58, 67, 69, 72, 78, 82, 89, 98
Blain v. Inby, 25 Kan. 499..... 72
Bliss v. Bliss, 221 Mass. 201.....57, 59, 67, 105, 107
Board of Assessors v. Comptoir National, 191 U. S. 388.....78, 87, 88
Bonaparte v. The Tax Court, 104 U. S. 592.....78, 86, 87

PAGE

Bonner v. Gorman, 213 U. S. 86..... 19
Booth v. Timoney, 3 Dem. 416..... 37
Braxton County Court v. West Virginia, 208 U. S. 192..... 121
Bridgeport Projectile Co. v. Bridgeport, 92 Conn. 316 108
Bridgeport Trust Co.'s Appeal, 77 Conn. 657..... 119
Bristol v. Washington County, 177 U. S. 133..... 72, 78, 82, 87, 88
Buck v. Beach, 206 U. S. 392.....22, 28, 67, 78, 82
Bullen v. Wisconsin, 240 U. S. 625.....91, 92, 99, 100
Burroughs on Taxation, p. 51..... 23

C

California Law Review, Vol. 14, p. 225.....67, 77, 103
Callahan v. Woodbridge, 171 Mass. 595..... 22
Cardozo:
Growth of the Law, The, pp. 117-118, 136-137..116-117
Nature of the Judicial Process, The, pp. 96, 150.. 116
Carpenter, Jurisdiction Over Debts, 31 Harv. L. R. 905.....64, 101
Catlin v. Hull, 21 Vt. 152.....69, 72, 74, 78, 79, 87, 108
Chicago, Rock Island & Pac. R. R. v. Sturm, 174 U. S. 710.....58, 67, 69, 70, 119
Citizens National Bank v. Durr, 257 U. S. 99.....91, 105
City of New York v. McLean, 170 N. Y. 374..... 57
Coe v. Errol, 116 U. S. 517..... 84
Coley's Estate, 14 Abv. Pr. 461..... 37
Colorado v. Harbeck, 232 N. Y. 71.....28, 36, 37, 39, 56
Columbia Law Review, Vol. 26, p. 605..... 69
Commonwealth v. Avery & Sons, 163 Ky. 828.....72, 94
Commonwealth v. Peebles, 134 Ky. 121..... 70
Commissioner v. Salting, 1907 App. Cas. 449..... 105
Consolidated Turnpike v. Norfolk etc. Railway Co., 228 U. S. 596..... 17

PAGE

Constitution, United States:
14th Amendment.....3, 22, 27
Art. 4, Sec. 1.....3, 118, 120
Cooke v. Tait, 265 U. S. 47..... 80
Corry v. Baltimore, 196 U. S. 466.....88, 107, 108
Cream of Wheat Co. v. Grand Forks, 253 U. S. 325..91, 93

D

DeBeam v. DeBeam, 115 Md. 668..... 69
DeGaney v. Lederer, 239 Fed. 568, 250 U. S. 376...
22, 78, 107
D. L. & W. R. R. Co. v. Penn., 198 U. S. 341.....81, 84
Despard v. Churchill, 53 N. Y. 192..... 36
Dewey v. Des Moines, 173 U. S. 193..... 57
Disconto Gesellschaft v. U. S. Steel Corp., 267 U. S.
22..... 107
Duffy v. Smith, 1 Dem. 202.....37, 40

E

Eidman v. Martinez, 184 U. S. 578..28, 58, 69, 74, 78, 82, 89
Ewing v. Warren, 144 Miss. 233.....59, 70, 105, 107

F

Ferriday v. Grosvenor, 86 Conn. 707..... 47
Fidelity Trust Co. v. Louisville, 245 U. S. 54..... 91
Finch v. York Co., 19 Neb. 50..... 72
Fisher v. Commissioners, 19 Kan. 414..... 94
Flynn v. White, 122 App. Div. 780..... 69
Foreign-Held Bonds Case, 15 Wall. 300.....22, 23, 28
Fowler's Decedent Estate Law, 207..... 37
Fox R. Paper Co. v. R. R. Commission, 274 U. S. 651. 17
Frick v. Penn., 268 U. S. 473...3, 14, 15, 16, 21, 25, 26, 27,
28, 29, 31, 52, 61, 63, 81, 85, 93, 99, 100, 101, 102, 114

G

PAGE
Gallup's Appeal, 76 Conn. 617 129
Gen'l Motors Corp. v. Ver Linden, 199 App. Div. 375. 69
Gray v. Lenox, 215 Mass. 598 70
Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139 119
Gregory v. Lansing, 115 Minn. 73 70

H

Hall v. Miller, 102 Tex. 289 23
Hardware & Mfg. Co. v. Lang & Co., 127 Mo. 242 ... 67, 69
Harris v. Balk, 198 U. S. 215 118
Harvard Law Review:
Vol. 39, p. 250—Validity of Inheritance Taxation Measured in Part by Value of Foreign Personalty 94
Vol. 40, p. 989 77
Hawley v. Malden, 232 U. S. 1 ..... 88, 107
Higgins v. Eaton, 202 Fed. 75, 188 Fed. 938, 229 U. S. 622 36
Hines Yellow Pine Trustees v. Martin, 268 U. S. 458 ..... 17, 18
Hoffman & Wood, Taxation of Federal, State and Municipal Bonds, p. 28, Sec. 74 23
Holcomb v. Phelps, 16 Conn. 127, 134 20
Hopkins' Appeal, 77 Conn. 644 ..... 19, 119
Hostetter's Estate, 267 Pa. 193 ..... 78, 108
Hoyt v. Commissioners, 23 N. Y. 224 ..... 72, 78, 87, 94

I

In re Clark's Estate, 37 Wash. 671 ..... 59, 119
In re Jefferson, 35 Minn. 215 ..... 78, 87
Iowa v. Slimmer, 248 U. S. 115 58

J

PAGE
Jahier v. Rascoe, 62 Misc. 699 105
Jellenik v. Huron Copper Mining Co., 177 U. S. 1 ... 69
Jessup-Redfield, Surrogate's Practice (6th Ed.), 82 and 93 ..... 37, 41
Johnson v. Harrison Naval Stores Co., 108 Miss. 627. 72
Johnston v. Smith, 25 Hun 171 42

K

Kaukauna Water Power Co. v. Green Bay etc. Co., 142 U. S. 254 17
Kidd v. Alabama, 188 U. S. 730 ..... 81, 91, 92
Kirtland v. Hotchkiss, 100 U. S. 491 ..... 78, 81, 86, 87

L

Laidley v. Lord Advocate, 1890 A. C. 468 ..... 72, 94, 105
Lampasas v. Bell, 180 U. S. 276 121
Liverpool Ins. Co. v. Assessors, 221 U. S. 346 ... 78, 87, 88
Lockwood v. Blodgett, 106 Conn. 525 20
Lorenzen:
Essay on Huber's de Conflictu Legum, Wigmore Celebration Legal Essays, p. 199 75
Extraterritorial Succession Taxes, 1 Conn. Bar Jour. 154 ..... 59, 77, 82, 103
Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385 ..... 94, 95, 103

M

Marye v. B. & O. Railroad Co., 127 U. S. 117 84
Marshall v. Dye, 231 U. S. 250 121
Matter of Bijur, 127 Misc. 206 105
Matter of Blackstone, 171 N. Y. 682, 188 U. S. 187 42
Matter of Bliss, 121 Misc. 773 ..... 36, 37, 56

PAGE

Matter of Bronson, 150 N. Y. 1 43
Matter of Burr, 16 Misc. 89 ..... 42, 43
Matter of Connell, 221 N. Y. 190 ..... 36, 40
Matter of Cooley, 186 N. Y. 220 43
Matter of Daly, 100 App. Div. 373 42
Matter of Delaplaine, 45 Hun 225 37
Matter of DuBois, 99 Misc. 219 42
Matter of Eaton, 159 App. Div. 7 ..... 37, 40
Matter of Gibbs, 60 Misc. 645 43
Matter of Gordon, 186 N. Y. 471 43
Matter of Henry, 237 N. Y. 204 42
Matter of Houdayer, 150 N. Y. 37 ..... 42, 43, 67
Matter of Hughes, 95 N. Y. 55 36
Matter of Jefferson, 35 Minn. 215 72
Matter of Lake, 112 Misc. 681 43
Matter of McCullough, 129 Misc. 113 ..... 36, 39
Matter of Miller, 5 Dem. 381 42
Matter of Morgan, 150 N. Y. 35 ..... 26, 43
Matter of Palmer, 183 N. Y. 238 43
Matter of Reimers, 107 Misc. 322 42
Matter of Romaine, 127 N. Y. 80 ..... 42, 43, 108
Matter of Rubens, 128 App. Div. 626, 195 N. Y. 527 .. 36, 41
Matter of Scott, 129 Misc. 625 ..... 59, 67, 78, 105
Matter of Swift, 137 N. Y. 77 ..... 59, 67, 78
Matter of Whiting, 150 N. Y. 27 ..... 23, 26, 43
McDougald v. Lilienthal, 174 Cal. 698 .. 59, 67, 72, 107, 119
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 400 ..... 22, 78, 87, 88
Michigan Law Review, Vol. 24, pp. 50-51 .... 30, 52, 77, 103
Moffitt v. Kelley, 218 U. S. 400 17
Moore v. Ruckgaber, 184 U. S. 593 89

N

PAGE

Neal v. Boykin, 132 Ga. 400.....59, 70
New Orleans v. Stempel, 175 U. S. 309..22, 23, 69, 87, 88, 96
Nickel v. Cole, 256 U. S. 222, 226..... 17

O

Orr v. Gilman, 183 U. S. 278..... 17

P

Palmetto Ins. Co. v. Conn, 272 U. S. 295..... 57
Parsons v. Lyman, 20 N. Y. 103.....36, 40, 43, 57, 78,
Patterson v. Colorado, 205 U. S. 454..... 18
Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477.... 18
People ex rel. Jefferson v. Smith, 88 N. Y. 576.....78, 83
People ex rel. Wynn v. Grifenhagen, 167 App. Div. 572 .....69, 107
People v. Home Ins. Co., 29 Cal. 533..... 22
People v. Ogdenburgh, 48 N. Y. 390..... 22
Phoenix Ins. Co. v. Tennessee, 161 U. S. 174..... 19
Plummer v. Coler, 178 U. S. 115..... 28
Pope v. Hartford, 82 Conn. 406..... 105
Poppelton v. Yamhill County, 18 Ore. 377..... 94
Powell:
Extraterritorial Inheritance Taxation, 20 Col. Law Rev. 283.....82, 94, 103
Situs of Business Credits, W. Va. Law Quart.... 83
Pullman Co. v. Pennsylvania, 141 U. S. 18...28, 74, 78, 84

R

PAGE

Re Ewing, 6 Prob. Div. 19 70
Redmond v. Commrs., 87 N. C. 122 ... 67, 72, 78, 87, 90, 108
Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69 ..... 91, 92
Robinson v. Dover, 59 Utah 521 72
Rogers v. Hennepin County, 124 Minn. 539, 240 U. S. 184 ..... 72, 88, 105

S

Sauer v. City of New York, 206 U. S. 536 17
Savings & Loan Society v. Multnomah County, 169 U. S. 421 ..... 67, 86, 87
Seefurth, Recent Limitations on the Power to Impose Inheritance and Estate Taxes, 25 Col. Law Rev. 870 ..... 77, 102
Selliger v. Kentucky, 213 U. S. 200 ..... 22, 72
Shaw v. Hartford, 56 Conn. 351 ..... 105, 108
Silberman v. Blodgett, 105 Conn. 192 2
Situs of Corporate Shares, Mich. Law Rev., Feb. 1927. 107
Slocum v. Sanford, 2 Conn. 533 20
Small's Estate, 151 Pa. 1 ..... 78, 105, 108
Smith v. Indiana, 191 U. S. 138 121
Southern Pacific Co. v. Kentucky, 226 U. S. 62 92
State ex rel. Dunnica v. County Court, 69 Mo. 454 ... 22
State ex rel. v. Leahy, 193 Mo. App. 36 69
Statutes:
California Laws, 1921, Ch. 821, Secs. 2, 13 113
Connecticut:
Laws of 1923, Ch. 190, Secs. 13, 17, 20, 22, 23, 30 ..... 3, 5, 12, 15, 47, 73, 111
Sec. 4956 47

PAGE

Illinois:
Laws of 1909, Sec. 9, p. 316 112
Smith's Rev. Stat., Ch. 39, Sec. 1 (1921) ... 51
Massachusetts Gen. Laws of 1921, Ch. 65, Sec. 8. 112
Mississippi—Heimingway's Code (Miss., 1927), Sec. 1447 51
New Jersey Laws of 1916, Ch. 191 106
New York:
Decedent Estate Law:
Sec. 22A, added by Laws of 1919, Ch. 294 .....33, 35, 54
Sec. 23 .....33, 35, 39, 54
Sec. 47 53
Secs. 130, 133 54
Personal Property Law, Art. 6, Secs. 162-185 106
Tax Law, Secs. 227, 248 112
Surrogate's Court Act:
Sec. 40. .....33, 36
Sec. 41. 34
Sec. 42. .....34, 36
Sec. 45. .....34, 36
Sec. 47. .....34, 35
Sec. 144. .....35, 36
Sec. 159. .....35, 55
Sec. 160. .....35, 36, 55
Sec. 165. 55
Ohio, Secs. 5348, 5531 112
Pennsylvania Laws, 1919, Act No. 258, Secs. 28, 35, 36 112
United States Judicial Code, Sec. 237a 4
St. Louis v. Ferry Co., 11 Wall. 423 78
Stern v. The Queen, (1896) Q. B. 21 107
Stewart v. Kansas City, 239 U. S. 14 121
Story, Conflict of Laws, 8th Ed. 1883, pp. 542-543 ...76, 77
Suydam v. Williamson, 65 U. S. 427 17

T

PAGE

Tappan v. Merchants Bank, 19 Wall. 490..... 86, 87, 105, 107, 108
Taylor v. St. Louis County, 47 Mo. 594.....94, 108
Telegraph Co. v. Howell, 162 Mo. App. 100..... 70
Terral v. Burke Constr. Co., 257 U. S. 529..... 57
Texas v. Fidelity & Dep. Co., 35 Tex. Civ. App. 214.. 23
Tidal Oil Co. v. Flanagan, 263 U. S. 444..... 18
Tilt v. Kelsey, 207 U. S. 43..... 118
Townsend v. Pell, 3 Dem. 367..... 42
Travers v. Yale & Towne Mfg. Co., 252 U. S. 60..... 105
Truax v. Corrigan, 257 U. S. 312, 324..... 19

U

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 .....28, 30, 61, 78, 81, 84, 85, 92, 93, 100, 108, 109
United States v. Bennett, 232 U. S. 299..... 80
United States v. Perkins, 163 U. S. 625..... 28

V

Veeder Mfg. Co. v. Marshall, 79 Conn. 15.....69, 108
Vinton v. Sargent, 195 Mass. 133.....59, 67, 70

W

Wachovia Bank & Trust Co. v. Doughton, 272 U. S. 567 .....29, 95, 100
Waggoner v. Wichita Co., 273 U. S. 113.....17, 18
Wait v. Kern River Mining Co., 157 Cal. 16..... 70
Walker v. Jack, 88 Fed. 576..... 22
Warner v. Corbin, 91 Conn. 532..... 119
Warrior C. & C. Co. v. National Bank, 53 So. (Ala.) 997 .....59, 70, 107

PAGE

Welsh v. Treasurer, 223 Mass. 87.....67, 72, 107
Western Ins. Co. v. Halliday, 110 Fed. 259..... 22
Westinghouse E. & M. Co. v. Los Angeles County, 188 Cal. 491..... 22
Wharton, Late Works on Private International Law, 6 So. Law. Rev. (N. S.) 680..... 75
Wheeler v. New York, 233 U. S. 434.....22, 23, 58
Wheeler v. Sohmer, 233 U. S. 434.....28, 67, 89
Wilcox v. Ellis, 14 Kan. 588.....67, 78, 83, 94, 96

Y

Yazoo & Miss. Valley R. R. Co. v. Clarksdale, 257 U. S. 10.....69, 70

Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, Petitioner, vs. ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc., Plaintiffs-in-Error, vs. WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.	No. 191

BRIEF FOR PLAINTIFFS-IN-ERROR IN No. 191 AND RESPONDENTS IN No. 190.

Preliminary Statement—The Federal Questions Involved.

Arguments on two appeals to this court arising out of a single judgment entered by the Superior Court of the

State of Connecticut pursuant to the opinion and advice of the Supreme Court of Errors of that state are presented in this brief. The case is reported below as *Silberman* v. *Blodgett*, 105 Conn. 192.

The case originated in the determination of the Tax Commissioner of the State of Connecticut that there was due to the state a succession tax on the entire estate, wherever situated, of Robert B. Hirsch, who died on September 23, 1924, a resident of Stamford, Conn. The net taxable estate was found to be $2,400,694.79, and the tax fixed by the Tax Commissioner at $188,780.58.

The property so taxed may for the purposes of these appeals be divided into three classes:

(a) Real estate and tangible personal property consisting of furniture, live stock and equipment physically situated in Stamford; three shares of stock in a Connecticut corporation; and a debt due to the decedent from a resident of Stamford; the aggregate value of such property being $49,097.27.

(b) United States Liberty Bonds and Treasury Certificates, payable to bearer, physically situated in the State of New York at the time of and for a long time, prior to the decedent's death, and cash on hand in New York, of the aggregate value of $615,408.65.

(c) The decedent's interest in the limited partnership of Wm. Openhym & Sons, organized under New York law and having its principal office there; shares of stock in New York, New Jersey and Canadian corporations and the proceeds of a policy of life insurance payable to the decedent's estate, the certificates and policy being physically situated at the time of the decedent's death and for a long time

prior thereto in the State of New York; and a savings account in the National City Bank of New York City; the aggregate value of these items of property being $1,980,038.26.

The executors have throughout conceded the right of the State of Connecticut to tax the succession to the property described in paragraph (a) above.

As to the property included in paragraphs (b) and (c), it was conceded that the applicable statute of the State of Connecticut, Chapter 190, Laws of 1923, attempted to levy a tax on the succession thereto—it purported to tax all property belonging to a resident decedent except foreign realty—but the executors protested that, so applied, it was unconstitutional and void, for taking property without due process of law in violation of the 14th Amendment to the Constitution of the United States, and for failing to give full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Section 1 of Article 4 of the Constitution of the United States.

The substance of the decision and the judgment was that the property enumerated in paragraph (b) above was tangible personal property, and hence under the decision of this court in *Frick* v. *Pennsylvania,* 268 U. S. 473, a tax on the succession thereto took property without due process of law in violation of the 14th Amendment; but as to the property listed in (c) above, the tax on the succession thereto was constitutional; and, furthermore, that there was no refusal to give full faith and credit to the public acts, records and judicial proceedings of the State of New York in any respect. As a result of this decision, the amount of the tax was reduced to $138,014.61.

The judgment of the Superior Court, given on the advice and direction of the Supreme Court of Errors, was

entered on December 10, 1926 (R. 78). From it, both parties have sought relief in this court.

From so much of the decision as held the statute constitutional in levying a tax on the succession to the property enumerated in (c) above, a writ of error from this court was allowed the executors on February 18, 1927 (R. 91), by the Hon. George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut. This writ, together with the petition for the writ, the assignments of error, the judge's certificate, the bond and the return, were filed on February 23, 1927 (R. 81, 85, 90, 92). This proceeding is No. 191, October Term, 1927.

The parties secured from Judge Wheeler a certificate showing that the validity of the statute under the Federal Constitution was drawn in question, that the decision and judgment in the case was in favor of the validity of the statute in respect to the property in paragraph (c), and that under Connecticut practice the judgment entered in the Superior Court on the advice and opinion of the Supreme Court of Errors was a final judgment and decree in the highest court of the State of Connecticut in which a decision in the suit could be had (R. 92-93). These facts also appear in numerous other parts of the brief (R. 4-5, 22-24, 76-80, 83-84).

The case, therefore, seems to be squarely within Section 237 (a) of the Judicial Code in its present form.

So far as No. 190 is concerned, the certificate just mentioned shows that there was also drawn in question the validity of the same statute on the same grounds, so far as it purported to tax the succession to the decedent's interest in the bearer United States Liberty Bonds and Treasury Certificates and cash on hand physically situated in the State of New York at the time of decedent's death, and that the decision as to these items was against

the validity of the statute (R. 93). To review this part of the decision the petitioner in No. 190 sought and secured the writ of certiorari (R. 95).

Because the two appeals arose from the same judgment and on the same record, and because the issues in the two appeals were to a considerable extent closely related, counsel for the parties stipulated that only one record should be printed and that the two cases should be briefed together (R. 96).

Assignments of Error.

The plaintiffs-in-error intend to urge all of the assignments of error filed in No. 191 (R. 85-89), but inasmuch as the assignments as they appear in the record were set forth at some length so that they might be technically complete, we think it may be helpful to the court if we give the substance of them.

The first, third, fifth, sixth and ninth assignments all relate to the taking of property without due process of law, while the second, fourth, seventh, eighth and tenth assignments complain of precisely the same phase of the decision or judgment, but in respect to the denial of full faith and credit to the public acts, records and judicial proceedings of the State of New York. All of the assignments are limited to so much of the judgment as relates to the succession tax on the decedent's partnership interest, stocks of corporations not organized under the laws of Connecticut, proceeds of the life insurance policy and savings bank deposits. With these qualifications, the first and second assignments complain of the judgment that Chapter 190 of the Public Acts of 1923 of Connecticut was valid; the third and fourth assignments complain of the judgment that the tax imposed by Chapter 190 was valid; the fifth and seventh assignments complain of the judgment that

your plaintiffs-in-error pay to the treasury of the State of Connecticut $138,014.61 as the succession tax due under Chapter 190; the sixth and eighth assignments complain of the judgment that the computation made by the Tax Commissioner was valid and correct; and the ninth and tenth assignments allege error in the Superior Court in sustaining the order and decree of the Probate Court approving the computation of the tax and sustaining it.

Statement of Facts.

Robert B. Hirsch died on September 23, 1924, domiciled at Stamford, Conn., and leaving a last will and testament (R. 6).

His estate at the time of his death was valued at $2,645,065.85, and, less deductions, the net taxable estate was appraised at $2,400,694.79 (R. 49). The gross estate consisted of certain real estate, furniture and miscellaneous personal property physically located in Stamford, valued at $46,301.75 (R. 7, pars. 3 and 4); bonds valued at $615,642.84, physically located in the State of New York, of which those due from Connecticut residents or corporations were valued only at $521.67, and the balance were Liberty Bonds and United States Treasury Certificates, payable to bearer (these Liberty Bonds being his individual property and distinct from the Liberty Bonds owned by the partnership) (R. 7, pars. 3 and 5; 24, Exh. A; 55-56; 79, pars. 3 and 4); stocks of New York, New Jersey, Canadian and Connecticut corporations, valued at $277,984.25, the certificates being all physically located in the State of New York, of which the certificates issued by Connecticut corporations were worth only $120 (R. 7, pars. 3 and 5; 25, Exh. B; 79, par. 5); a share in the New York limited partnership of Wm. Openhym & Sons, valued at $1,687,245.34 (R. 7, par. 3); and

miscellaneous intangible property valued at $17,891.67, of which $287.48 was cash on hand in New York, $14,928.67 was life insurance and savings bank deposits due from New York corporations, and $2,675.52 was a debt due from a resident of Connecticut (R. 7-8, pars. 3 and 6; 26, Exh. C).

These items of property we classified in our preliminary statement according to the legal questions here presented (*supra*, p. 2).

The business of Wm. Openhym & Sons was a limited partnership organized under New York law and having its principal place of business in New York City, all of the partners with the exception of the decedent being residents of the State of New York (R. 8). Details of the partnership agreement and property are given at some length in the stipulated facts (R. 8-10, pars. 7-13).

Decedent left a will and two codicils, all executed in New York City and conforming to the requirements of both New York and Connecticut law (R. 6, par. 1).

Of the five surviving executors named in the will none were residents of Connecticut; four were residents of New York and one of New Jersey, the latter doing business in New York (R. 6, par. 2).

All of the trustees named throughout the will are residents of or corporations organized under the laws of the State of New York (R. 10-13, par. 14).

The decedent's will and codicils are summarized in the record (R. 10-15, par. 14). For the purposes of this case, only the following facts seem important:

Only four of the beneficiaries, Harriet and Aleen Lassner, Josephine French and Josephine Thellian, *were residents of Connecticut* (R. 19, par. 20). The only outright gifts to these beneficiaries in Connecticut were the gift of the real estate and tangible personalty in Stamford valued at $46,301.75 to Harriet Lassner (R. 10, 51) and $20,000

to Josephine French (R. 52). In addition, trusts were created, one of $314,820.11, in which Harriet and Aleen Lassner were beneficiaries (R. 51), and one of $10,000, of which Josephine Thellian was the life beneficiary, the present value of the gift being $4,391.16, and the principal reverting to the residuary estate on her death (R. 52). *The trustees of these trusts were all residents of New York.*

Of the balance of the estate, there were various gifts outright and gifts of life estates and remainders payable in cash to individuals, non-residents of Connecticut (R. 10-11, 14-15, 51-54), and cash bequests totaling $75,000 to five charitable and educational corporations organized under the laws of the State of New York (R. 11, par. Eleventh of will; 19, par. 21; 52). Then the residue of the estate, amounting to $1,795,208.53, was given to twelve named trustees for the purpose of investing the principal and applying the net income to the free education of poor and deserving children in the Ethical Culture School, maintained by the Society of Ethical Culture in New York City, and of poor and deserving young men and women who are recommended by the directors of the Society for the career of teachers (R. 11-13, par. Fourteenth of will; 54). This gift was recognized to be for educational and charitable purposes (R. 19, par. 22; 36, last item; R. 41-48, Exhs. L and M).

The original will and codicils were filed and probated in the Surrogates' Court in New York County as a court of original jurisdiction on November 28, 1924, in accordance with the requirements and practice of New York law (R. 15). The petition for probate showed that the decedent was a resident of Connecticut at the time of his death (R. 28), and the letters testamentary so recited (R. 31). The ground stated for invoking jurisdiction of the New York court was the

fact that the decedent left personal property exceeding in value the sum of $10,000 within New York County (R. 28). The decree admitting the will to probate is in the same form as that for a domiciled resident and adjudged that it be admitted as the last will and testament "valid to pass real and personal property" (R. 30, Exh. F). The letters testamentary which were thereupon issued recited that the will had been approved and allowed; that the deceased was a resident of Connecticut and left property in New York *"by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us,"* and thereupon granted *"the administration of all and singular the goods, chattels and credits of the said deceased in any way concerning his will"* to the five executors (R. 31, Exh. G).

The executors thereupon proceeded with the administration of the estate in accordance with the directions and practice of the New York court. They secured an order to publish notice to creditors to present claims (R. 15). The trustees named in the various paragraphs of the will qualified in the New York Surrogates' Court in accordance with the New York practice (R. 15). The executors petitioned the Surrogates' Court for the appointment of a transfer tax appraiser, who was appointed on January 19, 1925, and the executors filed schedules with him (R. 15). The executors opened a bank account in New York City, in which all moneys of the estate collected have been deposited and through which they have been disbursed, and said bank account is the only one the executors have had (R. 15-16). From these moneys in New York the executors paid all of the cash bequests and set up all of the special trusts established in the will, paid all of the decedent's debts and the estate and transfer taxes other than that of Connecticut, expending $762,325.68 in so doing

(R. 16), and in addition they have paid to the residuary trustees for the account of the residuary trust established by paragraph 14 of the will a sum in excess of $780,000.

The executors also transferred all the stocks (except the three shares of the Stamford Theatre, Inc.) owned by the decedent, which stocks were registered in his name and unendorsed at the time of his death, and secured payment of the decedent's insurance, by exhibiting to the transfer agents and to the insurance company certificates of the letters testamentary issued by the New York court and waivers from the New York Tax Department (R. 16).

The executors took no steps to qualify in Connecticut until January 8, 1925. Then, pursuant to Section 4956 of the Connecticut statutes, they filed an exemplified copy of the will and codicils and the record of proceedings in the New York court, duly authenticated by the New York court, and requested letters testamentary (R. 18, par. 19; 38, Exh. J). Proceedings were thereupon held by the Court of Probate in Stamford, the exemplified record was approved and filed and letters testamentary were granted (R. 18-19; 40, Exh. K).

Under the New York tax law in effect at the date of the decedent's death, there was taxable the transfer of the interest of the decedent in the New York partnership and of the stock owned by him in New York corporations, and these were valued by the transfer tax appraiser appointed by the New York court at $1,938,341.56. There were then exempted from the New York tax the gifts to the five educational and charitable corporations and to the trustees of the residuary estate, and as a result the transfer tax assessed by the State of New York was reduced to $19,166.04 (R. 16-18, par. 17; 32-38, Exhs. H and I).

Tax proceedings were instituted in Connecticut, the executors filed a statement of the decedent's property under oath and the Tax Commissioner filed his report and

computation of tax on September 15, 1925 (R. 20). He reported that the decedent's entire estate was taxable in Connecticut and computed his tax on that theory, the total amount thereof amounting to $188,780.58 (R. 48, Exh. N).

The executors presented objections to the determination of the tax and a hearing thereon was held by the Court of Probate in Stamford. The grounds of the executors' objections were in substance those later filed as the reasons for appeal (R. 4, 20-21, par. 25).

Following the hearing on these objections before the Probate Judge, the Probate Court on December 4, 1925, entered an order confirming the computation of the Connecticut Tax Commissioner and overruling the executors' objections and directing the payment of the tax as computed (R. 21, par. 26). From this determination the executors appealed to the Superior Court for the County of Fairfield, the reasons for appeal being in substance that by the tax sought to be imposed, property was taken without due process of law, and full faith and credit were denied the laws of the State of New York, all in violation of the Federal Constitution (R. 4-6).

The succeeding steps and the decision are described in our preliminary statement.

By stipulation between the parties the payment of the tax claimed by the State of Connecticut has been suspended pending final determination by this court of the constitutionality of the Connecticut statute and the tax.

The Connecticut Statute Involved.

The Connecticut succession tax act applicable to the decedent's estate is Chapter 190, Public Acts of 1923 of the State of Connecticut. The section of that act under which the tax was levied reads as follows:

> "Section 1. All property and any interest therein owned by a resident of this state at the time of his decease, and all real estate within this state owned by a nonresident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this state * * * shall be subject to the tax herein prescribed. * * * The provisions of this act shall not apply to real estate situated without the state."

Analysis of the Connecticut Decision.

The discussion in the opinion of the Connecticut court of the problems involved in this case is full and includes numerous quotations from decisions. We have attempted to summarize the opinion in order to emphasize the principles on which the decision turned and the relation of the decision to our argument.

The facts as stated by the Connecticut court agree with our understanding of the record, except in one respect. The court states that the partnership assets included Connecticut real estate. Probably in making this assertion, the court had in mind the fact that the partnership owned stock of a New Jersey corporation which in turn owned a plant situated in Connecticut (R. 9, par. 9 [j]).

Summarizing that part of the opinion dealing with the law:

1. A succession tax is levied upon the right or privilege of succession to the property of a decedent and not upon the property itself. A succession tax is an excise dependent solely upon domicile and wholly independent of any right to impose a direct property tax; a property tax is an ad valorem tax dependent on the situs of the property. The first may properly depend on a valuation of property included in the succession on which the state could not impose a direct tax (R. 62, 64).

2. The general rule of law and that of the Connecticut courts and the principle upon which the Connecticut succession tax acts are based is that the right or privilege of succeeding to the personal property of a decedent, whether it is located within or without the state, is given by the laws of the state of his domicile, by which law alone it passes and its distribution and disposition are determined; and that accordingly the state of domicile has power to levy a tax upon the exercise of this right or privilege (R. 62, 63, 64).

3. Property may have an actual situs in another state and as a result that state may have jurisdiction for certain purposes in the course of administration, such as that of appropriating a sufficient amount to satisfy the claims of local creditors, and may apply its own policy, but such administration is always ancillary and in aid of the principal administration at the domicile and all the property is regarded as within the jurisdiction of the domicile for the purposes of administration and distribution. The statutes of more than four-fifths of the states purport to levy such a tax and the state decisions upheld them and

were generally sustained by the United States Supreme Court until the decision in the *Frick* case (R. 64, 65, 66).

4. The decision in the *Frick* case overturned a settled and established principle of probate law when it held that as to tangible personalty the power to regulate its transmission, administration and distribution lay with the state of situs and not the state of domicile (R. 65, 66).

5. The *Frick* decision did not apply to intangible property and it seems still to be the rule of the United States Supreme Court that as to intangibles the tax is on the right of succession and not on the property, that this succession takes place by virtue of the law of domicile, that the domicile is not prohibited from levying a tax thereon because the state of situs also taxes it, and that even in cases of ad valorem taxation the intangible property has a situs at the owner's domicile, though it may also have acquired a "business situs" elsewhere. There is no authority that such property can have a situs at the debtor's domicile and independent of the creditor's domicile. The law of Connecticut is in accordance with this (R. 64, 65, 66, 67-69, 70, 71).

6. Since the tax is not on a decedent's property, there is no occasion to determine its situs. Only domicile is of importance because the right of transfer exists by reason thereof. The granting of the right to dispose of the property is the privilege which is taxed. The act granting the right of transfer must be within the control of the state imposing the tax. The fallacy in the reasoning which vests jurisdiction to levy a succession tax in the state having the control of the property, as distinguished from the control of the transfer, has resulted in confusion (R. 64, 70-71).

7. The certificates of stock and the partnership interest are intangible property and can be taxed both where they are organized and at the decedent's domicile. The partnership, organized under the limited partnership act of New York, was subject to New York law substantially as a corporation organized there would have been (R. 72-74). The right to the proceeds of the life insurance policy and to the savings bank account vested in the decedent's estate as a creditor of the New York debtors and were subject to the succession tax of Connecticut (R. 75).

8. While the United States Bonds and Treasury Certificates are, strictly speaking, mere evidences of debt, such public securities are treated as tangible personal property and have come to be recognized as such, and under the *Frick* case they are subject to a transfer tax in New York where they were found and nowhere else. Cash is to be treated similarly (R. 74-75).

9. The claim for exemption of the bequests to New York charitable and educational corporations must be denied under the 1923 Act. The change made in 1925 which would exempt such bequests has no application (R. 76).

10. The net estate taxable by Connecticut must be reduced by deducting the value of the United States Bonds, Treasury Certificates and cash and the amount of the transfer tax paid to the State of New York on the value of the corporate stock and the limited partnership under the authority of the *Frick* case (R. 76).

POINT I.

The real complaint of the petitioner in No. 190 is directed to the determination of the Connecticut court that the Liberty Bonds, Treasury Certificates and cash on hand were in the nature of tangible personal property. This was a question of local law, with the decision of which this court has no concern. The decision on the federal question that the succession to tangible personal property physically situated outside Connecticut cannot constitutionally be taxed by that state follows the rule of this court.

Analysis of the opinion of the Connecticut court shows clearly the decision of two separate questions in relation to the tax on the succession to the Liberty Bonds, Treasury Certificates and cash on hand. (1) The court said that the bonds and Treasury Certificates "are strictly speaking mere evidences of debt and intangible personalty," but that they "pass from hand to hand on delivery [and] are treated as a species of tangible personal property and have come to be recognized as such" (R. 74), and accordingly it held that the practical considerations set forth "necessarily operate to convert United States Bonds and Treasury Certificates into tangible personal property" (R. 75). The cash on hand in New York was treated similarly (R. 75). (2) As tangible personal property, under *Frick* v. *Pennsylvania*, 268 U. S. 473, these items "are subject to a transfer tax in New York where they were found and nowhere else" (R. 75).

If these items of property were tangible in their nature, then it is obvious that the second question has been correctly decided. The *Frick* decision is precisely in point.

With the question whether these items were tangible this court is not concerned, if that question is one of local

law and if the answer is not an evasion of the federal question.

This rule hardly needs citation of authority to support it.

Patently there was no evasion of the federal question. The decision of that issue, against the constitutionality of the state statute, was the deciding factor in the case. The opinion shows throughout that the rule of the *Frick* case was applied, and the conclusion that the statute was unconstitutional was reached, with the greatest reluctance, but nevertheless the court felt bound by, and followed, the federal rule.

The only remaining question is whether the nature of these items of property was purely a matter of local law. We think it was clearly such, both as a matter of reason and under the decisions of this court.

Fox River Paper Co. v. *Railroad Commission,* 274 U. S. 651.
Waggoner v. *Wichita County,* 273 U. S. 113.
Hines Yellow Pine Trustees v. *Martin,* 268 U. S. 458.
Nickel v. *Cole,* 256 U. S. 222, 226.
Consolidated Turnpike v. *Norfolk, etc., Railway Co.,* 228 U. S. 596.
Moffitt v. *Kelly,* 218 U. S. 400.
Sauer v. *City of New York,* 206 U. S. 536.
Orr v. *Gilman,* 183 U. S. 278.
Kaukauna Water Power Co. v. *Green Bay, etc., Co.,* 142 U. S. 254.
Suydam v. *Williamson,* 65 U. S. 427.

See also additional cases cited, pages 3 and 4 of our brief in opposition to petition for writ of certiorari.

These cases all held in substance that the determination of the state courts on the nature of particular property

and property rights within the state was a question of local law upon which the determination of the state courts was conclusive and final and which this court had no jurisdiction to review or alter. It is difficult to conceive a question more clearly one of local law than that presented here whether the securities and cash were tangible or intangible in their nature. It is precisely like the question presented to this court in the *Waggoner* case, *supra*, where the state court decided that the interest of a lessor in an oil well on a royalty basis was realty, and is within the rule laid down by this court in a long line of cases that "the rules of unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts" (*Hines Yellow Pine Trustees* v. *Martin, supra,* at p. 462). We need hardly recall to this court's recollection the numberless instances in which states establish rules as to the classification of property for various purposes.

Nor would it be any objection to the binding effect of the state decision on the question of local law if the rule applied were contrary to the rule of law established in like cases by this court,

> *Pennsylvania Railroad Co.* v. *Hughes,* 191 U. S. 477, 486,
> *Hines Yellow Pine Trustees* v. *Martin, supra,* at p. 464,

nor if the decision of the state court in question amounted to a reversal or a modification of the pre-existing rule established by earlier state decisions,

> *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444,
> *Patterson* v. *Colorado* 205 U. S. 454, 460.

nor if the decision of the state court was erroneous.

Bonner v. *Gorman*, 213 U. S. 86, 91.
Phoenix Insurance Co. v. *Tennessee*, 161 U. S. 174, 185.

It is true that in many cases the opinion of this court shows an examination of the state law from which the conclusion is drawn that the rule announced by the court in the particular case was in accordance with the law. But we do not understand that this examination is made to determine whether the conclusion of the state court was or was not correct, but to determine whether, as the thought was expressed in *Truax* v. *Corrigan*, 257 U. S. 312, at 324, "the finding * * * is without substantial support" and whether as a result there is a deliberate evasion of the federal question. That question of evasion is not present in this case, and hence the Supreme Court of Errors of the State of Connecticut had the final jurisdiction to determine the nature of various property interests within the state.

As a matter of fact, the cases cited in the next point establish, we think, that the decision of the Connecticut court was correct as a matter of general law, certainly was not inconsistent with earlier decisions of the Connecticut courts, and was founded upon fact and common practice and understanding. Apparently the question whether public securities are tangible or intangible in their nature had not been squarely decided by a Connecticut court prior to the decision in the present case. The decisions in certain earlier Connecticut cases that such bonds located outside the State of Connecticut were subject to the Connecticut succession tax (*Hopkins' Appeal*, 77 Conn. 644, is an example) did not involve the question of the nature of the bonds. As the Connecticut court in the present case points out, the theory of the Connecticut tax

was that all personal property of a resident decedent, no matter where located, and whether tangible or intangible in nature, was subject to the Connecticut succession tax because jurisdiction to impose that tax depended on the state's control of the right to succeed thereto, and not on the situs or nature of the property. In certain earlier Connecticut decisions there had been approved the rule of the common law that debts represented by specialties had a situs where the specialty was.

Slocum v. *Sanford*, 2 Conn. 533.
Holcomb v. *Phelps*, 16 Conn. 127, 134.

But the specific question on the nature of public securities seems first to have been presented in the present case, and the distinction betwen public and private securities first to have been enunciated in a subsequent case, *Lockwood* v. *Blodgett*, 106 Conn. 525, where the court reaffirmed its decision in the present case that public securities were tangible in their nature, but held that private securities were intangible.

It seems to us that the present case presents a simple issue, where there must first be determined a question of local law and then a federal question arising from that determination; that the local question was determined by the state court without evasion of the federal question; that the federal question was thereupon determined correctly; and that this court, therefore, under the rule of the cases cited above and in our brief in opposition to the petition for the writ of certiorari, is not concerned with the decision of the local question.

POINT II.

The Liberty Bonds and Treasury Certificates payable to bearer and the cash on hand owned by the decedent were tangible in their nature. Since they were located outside the State of Connecticut at the time of his death, the Connecticut statute purporting to levy a tax on their transfer or succession thereto was unconstitutional and void.

At the time of the decedent's death he owned United States Liberty Bonds and Treasury Certificates, payable to bearer, of the aggregate value of $615,121.17. For convenience, these are collectively spoken of as Liberty Bonds throughout this point. At the time of his death, and for a long time prior thereto, they had been physically located in safe deposit boxes in the State of New York (R. 7, par.5; R. 24, Exh. A; R. 79, pars. 3 and 4).*

In addition, at the time of his death the decedent had $237.48 in coins and bank notes, described as "cash on hand", physically located in the State of New York (R. 8, par. 6; R. 26, Exh. C; R. 80, par. 9).

These items of property the Connecticut court decided to be tangible in nature (R. 74-75), and accordingly, under the rule of *Frick* v. *Pennsylvania, supra,* it decided that the succession thereto could not constitutionally be taxed by the State of Connecticut and that the statute attempting to tax them was to that extent unconstitutional

---

* It was agreed between counsel for the parties that for the purpose of this case these bonds and treasury certificates were the individual property of the decedent and were not partnership property, and accordingly they were not taxed by the State of New York although the interest of the decedent in the partnership was so taxed.

The decedent owned bonds of a Stamford golf club physically located in New York valued at $521.67. The tax on them is so minor that we have not complicated the material issues in the case by arguing whether Connecticut had jurisdiction to tax bonds of private corporations physically located in New York.

and void as taking property without due process of law in violation of the 14th Amendment to the Constitution of the United States (R. 76, answer to questions 4, 5, 10 and 12, R. 60-61; R. 79-80, pars. 3, 4, 9 and 11).

Bonds.

The decision that the bonds were tangible personal property or sufficiently of that nature so that they were subject to identically the same rules of taxation is in accordance with the decisions of this court and the general rule of law, and certainly is in accordance with actual fact and the practice in dealing with such securities.

Foreign-Held Bonds Case, 15 Wall. 300.
New Orleans v. *Stempel,* 175 U. S. 309, especially 321-323.
Blackstone v. *Miller,* 188 U. S. 189, 206.
Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395, 400.
Buck v. *Beach,* 206 U. S. 392, 403, 407, 412-413.
Selliger v. *Kentucky,* 213 U. S. 200, 204.
Wheeler v. *New York,* 233 U. S. 434, and cases cited p. 440.
Walker v. *Jack,* 88 Fed. 576, 578.
Western Ins. Co. v. *Halliday,* 110 Fed. 259, 263; same case, 127 Fed. 830, 834.
DeGanay v. *Lederer,* 239 Fed. 568, 573; aff'd 250 U. S. 376, 381.
People v. *Home Ins. Co.,* 29 Cal. 533, 544.
Westinghouse E. & M. Co. v. *Los Angeles County,* 188 Cal. 491, 494.
Callahan v. *Woodbridge,* 171 Mass. 595, 598.
State ex rel. Dunnica v. *County Court,* 69 Mo. 454, 457.
People v. *Ogdenburgh,* 48 N. Y. 390, 397.

Matter of Whiting, 150 N. Y. 27, 29.
Hall v. *Miller*, 102 Tex. 289, 295.
Texas v. *Fid. & Dep. Co.*, 35 Tex. Civ. App. 214, 218.
Attorney General v. *Glendining*, 92 L. T. N. S. 87.
Hoffman & Wood, *Taxation of Federal, State & Municipal Bonds*, page 28, Sec. 74.
Burroughs on *Taxation*, page 51.

It would be useless to extend this brief by the pertinent and persuasive quotations available in the foregoing cases. The *Foreign-Held Bonds Case* and *New Orleans* v. *Stempel* are probably the leading cases on the subject.

Probably the rule that public securities as distinguished from ordinary debts and other evidences of indebtedness are tangible in their nature and exist where the securities are found has a double origin, in part historical and in part based on commercial practice.

An extended discussion of the history of bonds and similar specialties at common law, showing how the distinction between them and other debts and evidences of debt arose, is hardly justified. Such a study would probably throw considerable light on the early decisions, but the historical origin has already been noted by this court in a number of the decisions cited. That origin seems of much less importance to-day than the practical considerations which would give rise to this distinction, whether there were an historical basis or not. As a matter of fact, the historical development of bonds has already been presented to this court in the learned discussion set forth as an appendix to the brief on behalf of the executors in the case of *Wheeler* v. *New York, supra*. The appendix commences at page 26 of the brief.

While history may have given the impetus to the early decisions that securities had a tangible nature, commer-

cial practice and the cold facts of the situation in the last century have given a basis of solid fact to the principle. What is the property of the security owner primarily except the piece of paper which he owns, representing the debtor's agreement to pay? To be sure, in some circumstances, if that piece of paper is lost or destroyed, he may have recourse against the debtor upon the underlying obligation, but in every instance this recourse is recognized as a secondary remedy to be called into play only when the physical paper cannot be produced and made the basis of the claim. The debtor is always entitled to be secured against a conflicting claim from one who produces the instrument in his own hands. This by itself is the best evidence that the primary property is the security itself. So, too, when the purchaser buys the obligation, what he receives is not a new promise from the obligor but the physical certificate of interest originally issued by the debtor, and it is that piece of paper which he guards as his property and that paper which he sells when he disposes of it.

The whole property right which inheres in him is based upon and relates to that very tangible asset, and in many cases without it he cannot recover at all. Doubtless this is one factor in the distinction between state and municipal bonds and others, because in the majority of instances the only evidence of obligation which such a debtor will recognize is the physical instrument itself. If that disappear, the owner has no recourse at all. His property has gone as truly as though it were a piece of furniture or an article of clothing lost or destroyed. To some extent, this situation may have been modified by the practice of registration of securities, but in the present instance all of the bonds owned by the decedent were payable to bearer and the enforceability of his claim was subject to their continuance in his possession.

The court's decision, therefore, rests on fact, common sense and current business practice, and any other decision would have exalted a theory and perfection of form above these practical considerations. The course followed was a healthy one and represents the practice of courts in touch with modern conditions and needs.

Cash on Hand.

It is hardly necessary to argue at length that the cash on hand was tangible in its nature. So far as it consisted of metal coins this must be conceded. So far as it consisted of bank notes it is true that those notes on the face show that they are only a promise by the bank or government, as the case may be, to pay gold or silver on demand. But this technical characterization as a mere promise to pay is so completely over-ridden by common practice and recognition of these notes as the money itself that we hardly think a serious argument will be made that the bank notes were intangible in their nature.

Conclusions.

The bonds and the cash on hand being tangible in nature, the rule of the *Frick* case is obviously applicable. It is needless to recite the principles there established. That decision did not turn on the fact that the property consisted of furniture and pictures, but on the fact that it was tangible personal property, and the decision must necessarily apply equally to any other tangible personal property.

If there is any doubt of the fact that the transfer of these bonds and the cash is accomplished by the New York courts under New York law, as the transfer of the pictures and furniture was in the *Frick* case, that fact will appear from our discussion in the next point (*infra*, p. 32 *et seq.*).

In the petition for a writ of certiorari and the accompanying brief the petitioner in No. 190 suggested that the fact that these bonds and cash were not subject to a transfer tax by New York created some right in the State of Connecticut to tax them. The fact that New York imposed no transfer tax on them is immaterial. The only question is whether the bonds and cash are tangible in nature and come within the *Frick* case. Whether New York taxes them or not throws no light on this question. In the *Frick* case it was equally true that New York levied no tax on the works of art purely as a matter of policy. The state could have taxed bonds had it so desired. From 1892 until 1911 the New York tax law provided for taxation of transfers of the "property of a nonresident within the state" and this was held to include bonds, whether of resident or nonresident obligors, if the instruments were physically within the state.

Matter of Whiting, 150 N. Y. 27.
Matter of Morgan, 150 N. Y. 35.

If the legislature in recent years has deemed it better policy to exempt such property from taxation the exemption creates no right in another state which that state otherwise would not possess. And certainly taxation or freedom from taxation has no bearing on the tangibility of the property, nor the question whether its transfer is accomplished solely by New York law.

POINT III.

The statute of the State of Connecticut purporting to levy a tax on the succession to the intangible property, other than the Lassner account receivable and the stock of a Connecticut corporation, owned by the decedent at the time of his death, violates the 14th Amendment to the Constitution of the United States by taking property without due process of law.

Coming now to the issues presented in No. 191, we have already shown that, aside from the real estate and tangible personal property in Connecticut, the three shares of stock of a Connecticut corporation, and the Lassner account receivable amounting to $2,675.52, due the decedent from a resident of Connecticut, his estate consisted of an interest in a limited partnership organized under New York law and doing business in New York City, Liberty Bonds and Treasury Certificates and shares of stock in New York, New Jersey and Canadian corporations, a life insurance policy in a New York insurance company, cash on hand, and a savings account in a New York City bank, the bonds, cash, stock certificates and insurance policy all being physically situated in New York when the decedent died. The question is whether Connecticut constitutionally could tax the succession to this property.

Two principles in the law of inheritance taxation were well established and universally accepted before this court rendered its decision in the case of *Frick* v. *Pennsylvania*, 268 U. S. 473:

1. Jurisdiction to tax depends upon jurisdiction of the thing taxed.

2. The thing taxed in the case of transfer and succession tax statutes is the transfer or succession, and not the property or persons involved.

Foreign Held Bonds Case, 15 Wall. 300, 319.
Pullman's Car Co. v. *Penn.*, 141 U. S. 18.
U. S. v. *Perkins*, 163 U. S. 625.
Plummer v. *Coler*, 178 U. S. 115.
Eidman v. *Martinez*, 184 U. S. 578.
Buck v. *Beach*, 206 U. S. 392, 400.
Wheeler v. *Sohmer*, 233 U. S. 434, 446.
Colorado v. *Harbeck*, 232 N. Y. 71.

Since the laws of a state can have no extraterritorial force or effect, it followed that only those states could tax the transfer or succession by virtue of whose laws or within whose jurisdiction the transfer or succession took place.

The *Frick* decision modified neither of these principles, but it made a very substantial modification in the law as generally understood (1) by holding that the law of a decedent's domicile was not necessarily invoked to accomplish the transfer of his personal property and that if it was not, the domicile lacked jurisdiction to levy a tax on the transfer, and (2) by treating *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, and its companion cases, as having held that for transfer as well as general tax purposes exclusive situs of tangible personal property was its physical location.

The *Frick* case, however, dealt with tangible, not intangible, personalty. This court said that intangibles stood on a different footing from tangibles—just as it said in the *Union Refrigerator* case that the situs of tangibles for general taxation was distinguishable from situs for transfer tax purposes. But in view of the substantial change in the law accomplished by the *Frick* case and the exten-

sion of these new principles in *Wachovia Bank & Trust Co* v. *Doughton*, 272 U. S. 567, and the general development of the law of taxation, there is fully warranted a re-examination of the principles applicable to taxation of the transfer of or succession to intangible property.

It is true, of course, that intangible personalty is distinguishable in many features from tangible personalty, but it does not necessarily follow that the transfer of such intangibles may not take place in fact solely under the law of a state other than that of the owner's domicile and with no aid from the law of the domicile, nor that such intangibles cannot have a distinct situs away from the domicile inconsistent in fact with a situs there. The two questions specifically presented by this case are: (1) Did the law of the State of Connecticut aid the transfer of the intangible property involved in these appeals in any degree or did the transfer take place exclusively under and by virtue of the laws of New York? (2) Had these items of intangible property, for the purposes of this case, a situs outside the State of Connecticut inconsistent with a situs in that state?

Before we embark on the discussion of the law and the facts particularly pertinent in answering these questions, it may be helpful to make the following general observations:

Up to the time of the *Frick* decision it was generally stated—though not universally by any means, as we shall presently see—that in accomplishing the transfer of a decedent's personal property the law of his domicile was always called into play and the transfer depended on that law, and therefore the state of domicile could levy a tax on the transfer or succession. This argument is very forcefully expressed by the Connecticut court in the opinion in the present case.

Support for that principle seems to have been drawn from two theories, not often distinguished and perhaps not distinguishable, but which certainly on their face have no relation to each other. On the one hand, it was said that because by rules of comity the state having actual control of the personal property applied the law of the decedent's domicile in determining the descent and distribution of this personalty, the law of the domicile was actually necessary to accomplish the transfer; that the state of domicile, by establishing this law, created the privilege of transferring this property; and, therefore, because this law was essential to the transfer it could tax that transfer. On the other hand, it was also generally said that by virtue of the common law maxim *mobilia sequuntur personam* all the personal property of a decedent followed him to his domicile and had there its legal situs, and because it had its situs there its transfer was governed by the law of the domicile, and therefore the domicile could tax that transfer.

See 24 *Mich Law Rev.* 50, 51-52.

So far as the second theory was concerned, the same courts which declared that, for the purpose of transfer taxation, personal property had both an actual situs and a situs at domicile by fiction, said that, for the purpose of administration of the same property, or when general taxation of tangible personalty was concerned, the actual situs was exclusive. The inconsistency is palpable. But between adherence to precedent and the fact that the *Union Refrigerator* case expressly excepted cases of transfer taxation, many of the courts kept to the old terminology and held that in transfer tax cases the old rule *mobilia sequuntur personam* was still applicable though an actual situs was recognized at some place away from the domicile.

The other theory, that the law of the domicile was applied in accomplishing the transfer of property, no matter what its situs, was certainly not overturned by this court until the *Frick* case was decided, and, until then, the state courts declared that theory to be the law. Obviously, however, it was not the fact, and the *Frick* decision certainly establishes a new principle in discarding the old unsound fiction and declaring the law to rest on fact.

Now the question arises, what justification has either fiction for survival in the case of the transfer of intangible property? Are there not facts in the transfer of intangibles substantially like the facts in the transfer of tangibles and just as inconsistent with the fiction?

In answering these questions, it should be borne in mind that primarily the question is: Under what law and what jurisdiction was the transfer accomplished? The justification of a transfer tax is jurisdiction of the transfer, and that question of jurisdiction, therefore, alone is material. *The question of situs is important only as it bears on the solution of this primary question.* It is essential to notice that this fact was not only admitted but emphasized by the Connecticut court in its opinion in the present case, and that both in its own statement of the law and its quotations from earlier decisions the court stated expressly or by inference that the situs of certain intangibles involved was outside Connecticut, but considered that nevertheless the transfer depended on Connecticut law and hence was taxable.

Treating the question as one of *fact and actuality*, it certainly is not difficult to establish that the succession to the decedent's intangible property involved in these appeals was accomplished solely under the laws of the State of New York and through the aid of its courts, and that the Connecticut statutes and courts extended no aid to the succession and could not interfere with it. Similarly,

so far as the question of situs throws any light on this question of the control of the succession, we think it can be shown that *in fact* the intangible property involved had an exclusive situs in New York and that any situs given it in Connecticut through the fiction *mobilia sequuntur personam* is inconsistent with the actual fact.

It must necessarily follow that if the transfer of this property was accomplished solely by New York law and that Connecticut had no jurisdiction over it, then under the fundamental principles stated at the beginning of this point Connecticut had no jurisdiction to levy a succession tax as to the property here involved.

We shall devote the first part of the argument in this point to showing that in fact and in law the transfer depended exclusively on the statutes and the courts of New York. Then we shall support this contention by reference to the practice and law of other states. Lastly, we shall take up the question of the situs of such intangibles so far as it relates to jurisdiction over succession to them.

1. The succession to all of the intangible property involved in these appeals took place under and by virtue of the laws of the State of New York and the action of its courts without any aid from or intervention by the laws or the courts of the State of Connecticut.

(a) UNDER THE STATUTES OF THE STATE OF NEW YORK THE SURROGATES' COURT FOR NEW YORK COUNTY IS AUTHORIZED TO TAKE JURISDICTION OF AND ADMINISTER PROPERTY OF A NON-RESIDENT DECEDENT WITHIN THE STATE.

A material part of the laws of the State of New York relating to the distribution of estates, both testate and intestate, is to be found in the Decedent Estate Law, Chapter 18, Laws of New York, 1909, constituting Chapter

13 of the Consolidated Laws. Among the sections of this Act we find the following very significant provisions:

Section 22-A was added to the statute by the Laws of 1919, Chapter 294. This deals with the "validity of wills executed without the State" and prescribes in substance that such a will, executed as prescribed by the laws "either of the *place where executed* or of the testator's domicile," shall be as valid as if executed in accordance with New York laws, "provided, such will is in writing and subscribed by the testator."

Section 23 as last amended by the Laws of 1919, Chapter 294, declares "What wills may be proved" and reads:

> "A will of real or personal property, executed as prescribed by the laws of the state, or a will of real or personal property executed without the state *in the mode prescribed by the law, either of the place where executed or of the testator's domicile, provided such will is in writing and subscribed by the testator,* may be admitted to probate in this state."

The body of New York law relating to the administration of estates is contained in the Surrogate's Court Act, Chapter 928 of the Laws of 1920, as amended. This contains the following provisions:

Section 40 prescribes the general jurisdiction of the surrogate's court and enumerates, among other subjects, power to probate wills and grant letters testamentary, to control executors and trustees and settle their accounts, to appoint successors in place of trustees, to enforce the payment of debts and legacies and the distribution of estates, "to determine the validity, construction or effect of any disposition of property contained in any will proved in his court." *No distinction is made whether the decedent is resident or non-resident.*

Section 41 provides for securing jurisdiction of persons by citation, and Section 42 provides for jurisdiction of subject-matter when the "jurisdictional facts prescribed by statute" exist, so that in the second case the proceeding is really a proceeding *in rem*.

Then Section 45 defines the cases in which one surrogate's court has jurisdiction exclusive of every other. Subdivision 1 refers to resident decedents, and subdivision 2 to non-resident decedents who die within the county leaving personal property in the state. Then comes the section under which the Surrogate of New York County took jurisdiction in this case:

> "3. Where the decedent, *not being a resident of the state, died without the state, leaving personal property within that county*, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered."

Then comes Section 47, which is so material that we quote it in full:

> "§ 47. Jurisdiction, how affected by locality of debts.
>
> For the purpose of conferring jurisdiction upon a surrogate's court, *a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor,* or either of two or more joint debtors, *resides;* and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision *does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only,* in terms negotiable or payable to the bearer or holder. Such a debt, *whether the debtor is a resident or a non-resident of the state,*

> *or a foreign or a domestic government*, state, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as *personal property at the place where the bond, note or other instrument is, either within or without the state.*"

The surrogate took jurisdiction of the probate and administration here as a matter of duty and not of discretion. Section 144 of the Surrogate's Court Act provides that the surrogate must examine into the making of the will and if it appears that it was duly executed and that the testator was competent, then "it *must* be admitted to probate as a will valid to pass * * * personal property * * *."

Sections 159 *et seq.* contain the provisions of New York law permitting the issuance of ancillary letters, and Section 160 authorizes the New York Surrogates' Court "having jurisdiction of the estate" to issue such letters on proof of original probate in foreign courts, except in the following cases:

> "1. * * * * * *
>
> "2. *Where original letters of administration, upon the estate, have been previously issued to a person entitled to the same*, who is legally competent to act, or the application therefor has not been finally disposed of."

Applying the foregoing statutes to the present case, it appears that by Sections 22 (a) and 23 of the Decedent Estate Law the decedent's will was valid and could be proved in New York irrespective of its validity in Connecticut, because it was executed in accordance with New York law (R. 6, par. 1). Under Section 47 the situs of the decedent's property with which we are here concerned was in New York County, because all his debtors, except

Mrs. Lassner, lived in that county, and his bonds and stocks were there. Under Section 45 the Surrogates' Court of that county acquired exclusive jurisdiction over the estate. Under Section 42 this jurisdiction was *in rem*. Under Section 40 it extended from proof of the will, over all the acts of the administration of the estate to the accounting by the executors and the trustees. The jurisdictional facts existing under Section 144, the Surrogate was required to probate the will in New York County. The language quoted from Section 160 shows that the *proceeding here was original, and not in any sense ancillary.*

It is well settled by New York law that such jurisdiction as is conferred on the New York Surrogates' Court by these statutes is original and plenary, and that the New York court need not and will not surrender any part of its jurisdiction to a foreign court, even though such court be that of the state where the decedent was domiciled, nor will it in such a case as this order the transmission of any part of the property to that state, or recognize the authority of executors or administrators appointed by such a court, or the authority of the court itself, or the application or limitations of the laws of that state, except as (in some measure) those regulating distribution are applied by express statutory enactment.

Matter of Bliss, 121 Misc. 773.
Matter of McCullough, 129 Misc. 113.
Colorado v. *Harbeck,* 232 N. Y. 71.
Matter of Connell, 221 N. Y. 190.
Matter of Hughes, 95 N. Y. 55, 60.
Despard v. *Churchill,* 53 N. Y. 192.
Parsons v. *Lyman,* 20 N. Y. 103.
Matter of Rubens, 128 App. Div. 626, aff'd on opinion below, 195 N. Y. 527.
Higgins v. *Eaton,* 202 Fed. 75, reversing 188 Fed. 938, cert. denied 229 U. S. 622, and see related

case, sub nom. *Matter of Eaton*, 159 App. Div. 7.

Matter of Delaplaine, 45 Hun 225.

Coley's Estate, 14 Abb. Pr. 461, 465.

Booth v. *Timoney*, 3 Dem. 416.

Duffy v. *Smith*, 1 Dem. 202.

Jessup-Redfield, Surrogate's Practice, 6th Ed., 82 and 93.

Fowler's Decedent Estate Law, 207.

Although all of the decisions cited are important for their support of these rules, particular attention may be called to the following:

Matter of Bliss, supra, involved a case strikingly similar to the present one. The opinion was rendered by Mr. Surrogate Foley, a jurist whose learning and ability entitle his opinion to the greatest weight.

The decedent was domiciled in Vermont, but the largest part of his estate was located in New York. Two independent probate proceedings were conducted, one in each state. When the executors came to account in New York, the State of Vermont filed objections on the ground that that state imposed an inheritance tax on certain beneficiaries, that so far as the legacies in this case consisted of personalty, wherever situated, they were subject to that tax, and that the assets should be transferred from New York to the Vermont court, or in the alternative, payment of the Vermont taxes should be directed. The surrogate dismissed the objections of Vermont. Under *Colorado* v. *Harbeck*, 232 N. Y. 71, the State of New York will not enforce the Vermont tax. Where the state of domicile can tax the transfer of foreign property, it must obtain payment out of the property within its boundaries. The surrogate will not, in the exercise of his discretion, transmit the assets from New York to the domicile. "*The adminis-*

tration here is not ancillary but original. Complete jurisdiction to probate the will and to direct distribution is vested in our courts." The transmission of assets to the domiciliary state is a matter of judicial discretion and "should not, however, be decreed unless the rights of creditors or beneficiaries will be served."

> "What I am asked to do is to quiet all question of the power of Vermont to levy a tax by giving it jurisdiction of the property. If the New York assets remain here it is doubtful whether the tax could be lawfully collected. If they could be brought within the taxing jurisdiction of Vermont and actually within her state limits, the tax must be levied under her law. The far-reaching consequence of the approval of such action must be apparent even to those unfamiliar with the intricacies of transfer tax litigation. Such procedure far exceeds any question of comity and would create a system whereby each state would become the busy collection agent of another state in gathering its taxes. The property might be directed to be transferred from state to state and depleted to the vanishing point by successive taxation. No good reason exists so far as the administration of this estate is concerned for the transfer of the assets to Vermont. The executors do not reside in that state; none of the legatees or beneficiaries demand that the assets be transferred; they acquiesce in the contention of the executors that they remain here. No question of marshalling of assets or debts exists. Vermont appears to be now amply secured for any tax due. One of the legatees, the Little Mothers Aid Association, a New York charitable corporation, is entitled under the will to a legacy of $350,000 for the erection of a home. *The granting of the relief sought by the tax commissioner of Vermont will prejudice a charitable corporation, which should be the special object of protection by our courts,* for the provisions of the will require prompt compliance by this legatee with certain con-

ditions, particularly the completion of the home within five years after testatrix's death. If the funds required to pay this legacy be administered through the Vermont Probate Court, delay will result in payment and possible forfeiture of the legacy may take place."

Matter of McCullough, the latest decision in point of time, is also by Surrogate Foley and the opinion contains a review of many of the decisions of the higher courts. The case was one where a resident of Colorado died, leaving personal property in New York County consisting of stocks, bonds and a bank account. Letters of administration were duly issued to the widow under Colorado law. Then there was offered for probate in the New York court a will executed in accordance with New York law. The questions were whether the surrogate's court should continue jurisdiction of the proceeding for the independent probate of the will or should transmit the will to the domiciliary probate court in Colorado, or whether ancillary letters of administration should be issued by the New York court on the decree of the Colorado court to the nominee of the Colorado administratrix.

The surrogate held that under New York law his court had jurisdiction of the proceeding "and that neither as a matter of right nor discretion should the will be transmitted to Colorado," referring to Section 23 of the Decedent Estate Law, quoted above, and that it is the surrogate's duty to proceed with the probate of a non-resident's will in such a case without awaiting action by the domiciliary state.

Colorado v. *Harbeck* is most important as a decision of the highest court of New York, showing the extent to which New York carries these principles in relation to taxation. There, the estate of a resident of Colorado was administered and distributed under New York law, with

no notice to the State of Colorado. Thereafter, under Colorado law, a proceeding was instituted in that state and a transfer tax assessed. The tax having been duly fixed in accordance with Colorado law, suit was brought in New York to collect it out of the property in New York. The New York court refused to aid in the collection of the tax. It pointed out the very obvious fact that the enforcement of tax laws rests on "force and authority," that Colorado had no control of the property or its owners (which is equally true in the present case), that the probate and transfer took place wholly under New York law without any aid from Colorado, and his right to make a will did not rest on Colorado law, nor was the Colorado law the source of the legatee's title. The court dismissed Colorado's argument based on the fiction *mobilia sequuntur personam* and said that the assets of the estate were not at the same time in New York and outside.

Parsons v. *Lyman* and *Duffy* v. *Smith* both involved conflicts with Connecticut administration. In the first case the assets were sent to Connecticut because of special circumstances appealing to the court's discretion, while in the second case transmission to Connecticut was refused. The *Parsons* opinion shows how even at a time when *mobilia sequuntur personam* was accorded universal respect it was only a rule of comity, subject to such exceptions as the state chose to make, and had nothing to do with the actual administration and transfer of the property.

In the *Connell* case, and in the various *Eaton* proceedings, which are well summarized in the opinion of the Appellate Division cited, the nature of the proceedings as proceedings *in rem*, binding non-resident parties through control of the property, is emphasized, and in the *Eaton* cases the power of New York to control the administra-

tion as to New York property, despite inconsistent action in the state of domicile, is again declared. In the *Rubens* case a will validly executed by New York law was upheld, although its execution was insufficient under the law of domicile.

Jessup states the rule to be that "A New York Surrogate has jurisdiction and may proceed with the probate of a non-resident's will of personal property executed according to the laws of such testator's residence without awaiting action by the corresponding tribunals of the other state or country" (p. 82). Later he says:

> "But, on the other hand, once a New York Surrogates' Court has rightly assumed jurisdiction, no action of foreign courts can disturb it or divest it of the control it has acquired over executors or administrators it may have appointed, or prevent it from compelling them to account for the assets they are administering. *Duffy* v. *Smith,* 1 Dem. 202-208. Nor even will this jurisdiction, once assumed, be disturbed by proof of the fact that the personal property which came into the county after decedent's death on the strength of which jurisdiction was exercised was brought in irregularly and without authority of law" (p. 93).

(b) THE PROPERTY LOCATED WITHIN THE STATE OF NEW YORK WHICH THE NEW YORK SURROGATE'S COURT WILL ADMINISTER INCLUDES ALL OF THE INTANGIBLE PROPERTY, A TAX ON THE SUCCESSION TO WHICH IS INVOLVED IN THESE APPEALS.

The Surrogates' Court of New York County will administer all of the items of property involved in these appeals. There is a wealth of authority on the kind of property so located within the State of New York that the courts of that state will take jurisdiction to adminis-

ter it. We confine ourselves here to the citation of the more important cases establishing the fact that the particular property with which we are concerned is in New York and will be administered in New York.

These cases are of two classes: (1) Where the direct question was asked whether New York had jurisdiction of a certain kind of property for the purposes of administration, and (2) where the question was asked whether, under the particular tax statute then in effect, New York could levy a tax on the transfer of property of that kind. Of course, New York's right to levy a transfer tax on the property depended on its jurisdiction of the transfer of that property, and, whether the particular opinion discussed jurisdiction of the property in so many words or not, necessarily the assertion of such jurisdiction is implicit in any decision that New York had authority to levy a transfer tax in the case.

PARTNERSHIP INTEREST:

Matter of Henry, 237 N. Y. 204.
Matter of DuBois, 99 Misc. 219.
Matter of Reimers, 107 Misc. 322.

BANK ACCOUNT:

Matter of Romaine, 127 N. Y. 80.
Matter of Houdayer, 150 N. Y. 37.
Matter of Blackstone, 171 N. Y. 682, 188 U. S. 187.
Matter of Daly, 100 App. Div. 373.
Townsend v. *Pell,* 3 Dem. 367.
Matter of Burr, 16 Misc. 89.

INSURANCE POLICY:

Matter of Miller, 5 Dem. 381.
Johnston v. *Smith,* 25 Hun 171, 176.

And compare reasoning in

Matter of Gordon, 186 N. Y. 471.
Matter of Gibbs, 60 Misc. 645.

CORPORATE STOCK:

Parsons v. *Lyman*, 20 N. Y. 103.
Matter of Romaine, *supra*.
Matter of Bronson, 150 N. Y. 1.
Matter of Whiting, 150 N. Y. 27.
Matter of Palmer, 183 N. Y. 238.
Matter of Cooley, 186 N. Y. 220.
Matter of Lake, 112 Misc. 681.

BONDS:

Beers v. *Shannon*, 73 N. Y. 292, 298.
Matter of Romaine, *supra*.
Matter of Whiting, *supra*.
Matter of Morgan, 150 N. Y. 35.
Matter of Gibbs, *supra*.

CASH:

Matter of Houdayer, *supra*.
Matter of Burr, *supra*.

(c) THE SURROGATES' COURT FOR NEW YORK COUNTY HAS TAKEN AND WILL RETAIN ORIGINAL JURISDICTION FOR THE PROBATE OF THE DECEDENT'S WILL IN THIS CASE AND THE ADMINISTRATION OF ALL OF THE DECEDENT'S PROPERTY, A TAX ON THE TRANSFER OF WHICH IS INVOLVED IN THESE APPEALS, AND THE EXECUTORS HAVE PROCEEDED WITH THE ADMINISTRATION OF ALL THESE ASSETS SOLELY UNDER THE JURISDICTION AND AUTHORITY OF THE STATE OF NEW YORK.

Up to this point we have dealt with the general question of jurisdiction and practice in New York in relation to

non-resident estates and to intangible property of the nature of that involved in this case, and we think that the conclusion has necessarily followed that the transfer of all this property belonging to the decedent will be accomplished under New York law without invoking any aid from or permitting any interference from the statutes or the courts of Connecticut.

If anything is needed to support the conclusions which we have drawn, it is furnished by the actual proceedings had in the present case and the actual administration of all the property with which we are concerned in the present case. Substantially the decedent's entire estate—everything except the real property and the tangible personal property located in Stamford and perhaps the Lassner account receivable and the stock and bonds issued by Connecticut corporations—has been or is being administered by the courts of New York independent of the laws or the courts of Connecticut.

We showed in our statement of facts that the decedent died on September 23, 1924, leaving a will and two codicils, executed in accordance with the laws both of New York and Connecticut. We showed further that none of the executors were residents of Connecticut, but on the contrary, four resided in New York and one in New Jersey and that all of the trustees under all of the trusts were either individuals resident in New York or corporations organized under its laws. It appeared further that of the various gifts made by the will and codicils only the real estate and tangible personal property and $20,000 in cash were given outright to residents of Connecticut; that trusts of the total value of approximately $320,000 were created in which residents of Connecticut were the beneficiaries, but all the trustees were residents in New York; and that all the rest of the gifts, either outright or in trust, including the entire residuary estate, went to non-residents of Connecticut (*supra*, pp. 7-8).

The steps taken under New York statutes and in the New York courts are of sufficient importance so that we feel justified in stating them in some detail.

Original probate was secured in New York. Three weeks after the decedent's death his will and codicils were offered for probate to the Surrogates' Court of the County of New York (R. 15). The petition for probate was presented by two of the executors living in New York City and showed that the decedent was a non-resident of the state, that he left personal property exceeding $10,000 in value in the County and State of New York and contained certain formal recitals, and closed with a prayer that a citation be issued to the persons named, that an order be entered directing service of that citation personally without the state or by publication on such persons as were non-residents of New York or whose names or residences were unknown, that the will be admitted to probate as a will of real and personal property and that letters testamentary issue to the executors (R. 27-30, Exh. E).

Acting under this petition, a citation was issued in accordance with New York practice and was duly served (R. 15).

On the return of the citation *the surrogate entered a decree on November 28, 1924, admitting the will and codicils to probate* (R. 15). From the order so entered it appears that the surrogate had appointed a special guardian in the proceeding and had heard proofs, and thereupon he ordered and adjudged that "the instruments offered for probate herein be and the same hereby are *admitted to probate as the Last Will and Testament of the said deceased, valid to pass real and personal property, and that letters testamentary be issued thereon to the executors who may qualify thereunder*" (R. 30, Exh. F).

Thereupon, on the same day, November 28, 1924, letters testamentary were issued to the five executors who are the

respondents in No. 190 and the plaintiffs-in-error in No. 191 (R. 15). Those letters recited that the will had been proved before and allowed by a New York surrogate, that the decedent was a resident of Connecticut, that he left property in New York County *"by means whereof the proving and registering of said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us"* and thereupon *"the administration of all and singular goods, chattels and credits of the said deceased in any way concerning his will" is granted to the five executors* (R. 31, Exh. G).

Thereafter, in accordance with the New York practice, the executors applied for an order to publish notice to creditors to present claims and the surrogate of New York County granted such an order on December 8, 1924, and such notice was duly published (R. 15).

One of the three trustees named in certain paragraphs of the will having died before the testator, Abraham L. Gutman qualified as a trustee under the provisions of the will, and his designation as a trustee and his oath of qualification were both filed in the Surrogates' Court of New York County. Similarly, the trustees of the residuary bequest all filed their oaths of qualification in the same court (R. 15).

All of these steps were taken in New York County before any action whatsoever was taken in any court of the State of Connecticut.

The decedent owned real estate and tangible personalty in that state. Of course, Connecticut had jurisdiction to tax the succession to this property, which was all left to a resident of Connecticut. The tax was to be paid out of the capital of the estate and not charged against the beneficiary (R. 14, par. Eighteenth of Will). Probate in

Connecticut seemed advisable. In the first place, it seems that under Connecticut law title to the real estate would not have been clearly vested in Mrs. Lassner until the will had been probated there.

Ferriday v. *Grosvenor,* 86 Conn. at 707.

In the second place, under Section 13 of the Connecticut tax statute (Ch. 190, Public Acts of 1923), the tax would have been a lien on the property until paid, and it seems that the tax commissioner could have instituted probate proceedings himself solely for the purpose of having the tax determined.

Accordingly, the executors sought probate of the will and letters of administration in Connecticut. They proceeded under Section 4956 of the Connecticut statutes, which provides that where a will conveying property situated in Connecticut *has been proved outside the state,* the executor may present authenticated and exemplified copies of the will and the proceedings establishing it, and on due proof the copies are to be filed with the same effect on the property as if the will had been originally proved in Connecticut. No distinction is made whether the will is one of a resident or a non-resident of Connecticut, except that a resident's will made in Connecticut cannot be proved unless executed according to Connecticut law. "All property so passing shall be subject to the provisions of all laws of this state relating to inheritances and successions and taxation thereof."

Connecticut probate was not sought until January 8, 1925, when the executors exhibited to the court in Stamford a duly authenticated and exemplified copy of the will and of the codicils and of the record of the proceedings establishing them in the New York Surrogates' Court (R. 18, par. 19; 38, Exh. J). Thereupon, reciting these facts, on January 15, 1925, the probate court in Stamford granted

letters testamentary to the executors (R. 18; 40, Exh. K). Then under Connecticut procedure the Stamford court made an order limiting the time for the presentation of creditors' claims and directing that an inventory of the estate be filed and appointing appraisers (R. 19). The inventory and appraisal were filed (R. 19) and on September 1, 1925, the executors filed a statement of the property in the estate for the purpose of having the succession tax due Connecticut determined (R. 20, par. 23). As shown in the preliminary statement, the tax commissioner determined that all of the property belonging to the decedent was taxable and was upheld by the various Connecticut courts to which appeal was taken.

It is to be noted that in all these proceedings the executors took only the steps which they would have taken had the decedent been a non-resident of Connecticut. It was necessary to probate the will and take these steps in Connecticut but only so far as realty and tangible personal property there were involved. Over these items of property Connecticut properly asserted jurisdiction. (Perhaps Connecticut could have prevented the transfer of the Lassner account receivable and the Connecticut stock and bonds, too, but whether it could or not seems immaterial, since we do not protest the tax on them.)

If it be argued that by so probating the will in Connecticut the executors submitted to a jurisdiction which that state otherwise could not have asserted, we shall show subsequently that this is not the law (*infra*, p. 57). It is well established that where a state has certain jurisdiction of parties or property, the submission of the parties to that jurisdiction or the control of the property does not extend the jurisdiction of the state for other purposes.

After the probate in Connecticut was secured the executors continued with the administration and distribution of the entire estate, excepting only the realty and tangible

personalty, under the authority granted them by the New York court and under the supervision and control of that court.

Money was due the estate on the life insurance policy issued by the Mutual Life Insurance Company of New York. This was collected by exhibiting to the company copies of the letters testamentary from the New York court together with proof of claim and certificate of death (R. 16, par. 16). The savings account was collected from the National City Bank of New York on the same papers (R. 16, par. 16). The certificates of stock owned by the decedent (R. 25, Exh. B), valued in excess of $277,777, representing shares of stock in fifteen different corporations and all standing in the decedent's name at the time of his death and unendorsed, were transferred by exhibiting to the transfer agents of the different corporations copies of the New York letters testamentary together with tax waivers from the proper state officials. So far as these waivers were concerned, it was necessary to secure a Connecticut waiver only as to the three shares of Connecticut stock, and as to all the transfers, it was necessary only to show the authority of the executors from the New York court (R. 16, par. 16).

The executors opened a bank account in the Central Union Trust Company, New York City, through which they have handled moneys coming to them by virtue of their position. They have never had a bank account in Connecticut or anywhere outside New York (R. 15-16, par. 16). Out of this bank account they have paid all of the legacies provided for in paragraphs Eighth, Eleventh and Thirteenth of the will and in the first and second codicils, have paid the decedent's debts and the Federal estate and New York transfer taxes, and have paid over to the trustees named in the Third, Sixth, Seventh, Ninth, Tenth and Twelfth paragraphs of the will

and third paragraph of the second codicil the capital of the trust funds established, the total amount of such payments made by them up to the time the stipulation of facts was signed on February 26, 1926, being $762,325.68 (R. 16, par. 16). Administration has, of course, been continued in New York, and the executors have since paid over to the residuary trust an additional sum exceeding $780,000.

Meanwhile, no additional steps whatever have been taken in Connecticut either as to distribution or accounting, nor is it proposed to take such steps until it becomes necessary to account for the few items of property, the administration of which we have conceded to be within the proper jurisdiction of Connecticut.

(d) THE LAW AND THE COURTS OF THE STATE OF CONNECTICUT DO NOT AID AND CANNOT INTERFERE WITH THE TRANSFER OF OR SUCCESSION TO THE PROPERTY INVOLVED IN THESE APPEALS.

Up to this point we have shown affirmatively how New York administers and controls the transfer of the property of a non-resident, such as that involved in these appeals, to the exclusion of the state of domicile. We now propose to examine the reverse side of the shield and see how powerless Connecticut is. We shall then show that the law and the policy of other states is substantially like that of New York.

It is essential to recognize the distinction which we have already suggested between the law of administration and the law of distribution. So far as we know, it is the universal rule that so far as the actual administration of property within the territory of a state is concerned, that state applies its own law and makes no reference whatever to the law of the owner's domicile. That is not to say, of course, that a state may not permit payment over to an

executor or an administrator at the domicile. Such a course is purely a matter of state policy, universally subject to the right of resident claimants against the non-resident estate to interfere for their own protection, and subject now in the very great majority of states to the insistence of the state that before this be done, a transfer tax shall first be paid to it or else the person permitting the transfer shall be liable therefor. Of course, when we speak of the law of administration, we mean the law prescribing the steps by which title to and the ownership of property may be transferred out of the decedent into the ultimate recipient, and this, after all, is the actual transfer.

Contrasted to this, the law of distribution is that law which determines to what person the decedent's property shall pass. For the answer to this question, the majority of our states refer to the law of the decedent's domicile. They refer to the law of the domicile not because it has any force or effect of its own within their own territory, but because as a matter of practical convenience and comity it is advisable that all of a man's property should be distributed under a common set of rules. Such reference to the law of domicile is always subject to whatever exceptions the state controlling the property may choose to make. Such exceptions probably exist in every state, ranging from simple protection of resident creditors to the situation which exists in Mississippi and Illinois, where the law of the domicile is disregarded entirely and the rules of distribution of those two states are applied to all non-resident property within their borders.

Hemingway's Code (Miss.), 1927, Sec. 1447.
Smith's Ill. Rev. Stat., Chap. 39, Sec. 1 (1921).

Cases supporting these distinctions are cited *supra*, page 36, and *infra*, page 58.

Now, of course, so far as the justification for the transfer tax by the state of domicile on all of a resident decedent's personal property rests on the theory that the law of the domicile is essential to the accomplishment of the transfer, it is based on this fact that the state having actual control of the property usually refers to the law of the domicile to determine the distribution of the property. It would seem that the *Frick* decision has disposed as a matter of law of this traditional argument. That decision has pointed out the fallacy of the theory and shown that in fact the law of the domicile has no effect except by virtue of its adoption by the state where administration is had, and then the force of the domiciliary law results, not from its own power, but from the law of the state of administration adopting it.

See discussion, 24 *Mich. Law Rev.* 50, 52-53.

So far as this principle of the *Frick* decision is concerned, there can be no distinction between tangible and intangible property. Whether there can be a distinction so far as the *situs* of tangibles and intangibles is concerned, we shall argue separately—though how that can be material we do not see, when the thing taxed is the transfer, and the transfer takes place in New York, by New York law. Certainly, so far as the application of New York or Connecticut law is concerned in the New York administration, the situation is identical, no matter to which class the particular property belongs. Whether the decedent's entire estate in New York consisted of horses, cattle and furniture, or whether it consisted of debts due from and causes of action against New York residents, the New York law of administration and its reference to Connecticut law is identical. The New York law just as much governs the disposition of intangibles as of tangibles so far as the legislature adopts

rules in conflict with Connecticut law, and so far as Connecticut rules are applied in New York to the disposition of intangibles administered here, it is just as much dependent for its force on New York's adoption as if tangibles were involved.

Taking the present case, it is quite clear that the law of Connecticut in and of itself has conferred nothing on this estate. Under some circumstances New York might refer to Connecticut law to determine where the property should go, but in fact in this case it will not do so, and if it did so it would be purely as a matter of policy, subject to any number of limitations and with no power in the State of Connecticut to assure its resident decedent or his representatives that the Connecticut law could benefit them. This appears clearly from an analysis of New York statutory and case law.

So far as Connecticut law is invoked to test the decedent's will, it is only by virtue of the provisions of Section 47 of the Decedent Estate Law of the State of New York. Speaking of property other than real estate, that law declares "the validity and effect of a testamentary disposition of any other property situated within the state * * * are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death." So the laws of other states become a rule of decision in New York, but obviously they have no force of their own within this state.

This is the more evident when the limitations on the adoption of foreign law are considered. Section 47 contains two such qualifications. Just before the language quoted above we find "*except where special provision is otherwise made by law.*" Following the provision quoted above is another sentence: "Whenever a decedent, being a citizen of the United States or a citizen or a subject of a foreign country, *wherever resident, shall have declared*

in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws." A testator, by a simple clause in his will, can avoid any reference whatever to the law of his domicile.

"Special provision is otherwise made by law" in a number of cases. We have already referred to Sections 22 (a) and 23 of the Decedent Estate Law. Section 22 (a) provides that a will executed outside the state in accordance with the law "either of the place *where executed* or of the testator's domicile" is valid. In other words, had the decedent in this case executed his will in New Jersey according to New Jersey law, it would have been recognized in New York even if it was improperly executed under Connecticut law. By Section 23 a will "executed as prescribed *by the laws of the state*" or as prescribed by the law "either of the place where executed or of the testator's domicile" may be admitted to probate in New York. In other words, in this particular case, the will, having been executed in New York (R. 6), was entitled to probate here even if it had not been executed according to Connecticut law. Both these sections are subject to the further provisions that though the will is valid where executed, it must still be "in writing and subscribed by the testator" to be recognized in New York.

Section 130 permits an executor or administrator appointed in any state in the Union or in any foreign country where the decedent has left surviving a husband, wife or next of kin to maintain an action in New York to recover damages for wrongful death of the decedent subject to certain prescribed limitations. Section 133, however, prescribes how the damages recovered are to be divided among the decedent's successors under the supervision of the surrogate's court. This direction must be

followed, although the law of the domicile might prescribe a totally different division.

On turning to the Surrogate's Court Act, we find similar proof that the law of domicile is effective here only by virtue of express adoption and then subject to such limitations as our legislature chooses to make.

Even where original jurisdiction of an estate is secured by a court other than that of New York, it depends for effective enforcement of control over property within New York upon the permission of the New York Legislature. Sections 159 and 160 of the Surrogate's Court Act relate to ancillary letters. Section 159 directs the issuance of ancillary letters upon proof of the proper issuance of original letters in the foreign court by "the Surrogate's Court *having jurisdiction of the estate.*" Section 160 is the equivalent provision for administration of an intestate foreign estate, the ancillary letters of administration to be issued by the surrogate's court "*having jurisdiction of the estate.*"

By Section 165, however, this permission for ancillary administration is subject to the rule that before any assets are transmitted out of the state the surrogate's court having jurisdiction may direct the ancillary representative "to pay out of the money or the avails of the property *received by him under the ancillary letters and with which he is chargeable upon his accounting the debts of the decedent due to creditors residing within the state.*"

It is unnecessary, we think, to elaborate comment upon these provisions of New York law to which we have referred. They are illustrative of the general policy of the law and of the plenary control which New York asserts over property within its jurisdiction, though the estate to which it belongs is that of a non-resident.

We offer these references to the New York law simply as confirming the obvious soundness of the ruling in the *Frick* case. We believe that that case settled the law.

Of course the fact that the executors appeared in the probate court in Stamford confers no jurisdiction on Connecticut over the estate which it would not otherwise have possessed. We showed why it was necessary for the executors to go into the Connecticut court for the purpose of securing administration of the tangible personal property situated in Connecticut and of giving clear title to the real estate which the decedent owned in Stamford, and that Connecticut had jurisdiction to levy a tax on the succession to this tangible property and real estate (*supra*, p. 46).

Now, had the executors chosen not to appear in Connecticut, and had they permitted the State of Connecticut to conduct a proceeding instituted by its tax commissioner, that state would undoubtedly have assessed a succession tax against the entire estate of the decedent so far as it could discover the amount. But when it came to collect that tax, it would necessarily have been limited to collecting something less than the $50,000 represented by the real estate, the tangible personalty and the Lassner account receivable and three shares of Stamford Theatre stock. That was the only property over which it had sufficient power to levy for the purpose of collecting its taxes.

The State of New York would have extended no aid or assistance to Connecticut to collect the tax from property in New York.

> *Colorado v. Harbeck, supra*, p. 36.
> *Matter of Bliss, supra*, p. 36.

Although the executors appeared in the Connecticut court, it is quite evident that the Connecticut courts must recognize the decrees and judgments of the New York Surrogates' Court in the administration and distribution of this estate so far as they relate to any part of the property involved in these appeals. They must do this whether

the rules applied by the New York court are in accordance with Connecticut rules or not, and even if the New York court purported to reach its conclusions in accordance with Connecticut law and misinterpreted that law. To do otherwise would be a denial of full faith and credit in violation of the Federal Constitution (see Point IV, *infra*, p. 118).

But entirely aside from this, it is well settled that where general jurisdiction has been properly secured over parties for a particular purpose, there is not thereby conferred on the court or on the state in which the court is situated jurisdiction over those parties for purposes which would have otherwise been beyond their jurisdiction.

Parsons v. *Lyman*, 20 N. Y. 103, 116-117.
Bliss v. *Bliss*, 221 Mass. 201, 205.
Dewey v. *Des Moines*, 173 U. S. 193.
Terral v. *Burke Construction Co.*, 257 U. S. 529.
Palmetto Ins. Co. v. *Conn.*, 272 U. S. 295.
City of New York v. *McLean*, 170 N. Y. 374.

The State of Connecticut could properly control the executors so far as the administration of the real estate, tangible personalty, Lassner account receivable and the Stamford Theatre stock was concerned. Having secured jurisdiction for this purpose, they cannot go further and assert jurisdiction over other property which is in fact subject to the jurisdiction of the State of New York and is actually under administration by the courts of that state.

(c) THE GENERAL RULE OF LAW AND THE USUAL POLICY THROUGHOUT THE UNITED STATES IS IN ACCORDANCE WITH THE RULE AND POLICY OF NEW YORK.

The New York rule that, so far as administration of property within the state is concerned, the laws of that

state alone apply; that so far as distribution is concerned, the laws of the domicile are referred to only as a matter of comity, to the extent permitted by the first state and subject to whatever limitations it chooses to make; and that the state of domicile can do nothing to make its laws or the rights given under them effective, is the general law throughout the United States. The statement in many decisions that the law of the domicile must govern the distribution and must be respected by the state having actual jurisdiction of the property is inaccurate. It is a generalization which is disregarded in practice by the very courts which make it. Usually the statement will be found either to be pure dictum or to have been announced by the courts of the state of domicile as an excuse for levying a tax upon the transfer where the actual administration took place in the courts of another state. There are, to be sure, two exceptional classes of decisions, the first those where the courts find that the legislatures have not chosen to exercise their powers—questions of interpretation and not of power—and the second, a few cases where courts have denied the existence of the power itself. The first class, of course, are distinguishable, and the second are contrary to the general line of authority in the United States.

The following cases show that the state having actual control over the property has the power to administer and distribute it as it sees fit either to the partial or total exclusion of the state of domicile and its law.

Iowa v. *Slimmer*, 248 U. S. 115.
Baker v. *Baker, Eccles & Co.*, 242 U. S. 394.
Wheeler v. *New York*, 233 U. S. 434.
Chicago, Rock Island & Pac. R. R. v. *Sturm*, 174 U. S. 710.
Blackstone v. *Miller*, 188 U. S. 189.
Eidman v. *Martinez*, 184 U. S. 578.

Warrior C. & C. Co. v. *Nat'l Bank,* (Ala.) 53 So. 997.
McDougald v. *Lilienthal,* 174 Cal. 698.
Adams v. *Phelps,* 16 Conn. 127.
Neal v. *Boykin,* 132 Ga. 400.
Vinton v. *Sargent,* 195 Mass. 133.
Bliss v. *Bliss,* 221 Mass. 201.
Ewing v. *Warren,* 144 Miss. 233.
Matter of Swift, 137 N. Y. 77, 86.
In re Clark's Estate, 37 Wash. 671.

See also excellent discussion of principle in

Matter of Swift, 137 N. Y. 77.
Matter of Scott, 129 Misc. 625.
Lorenzen *Extra-territorial Succession Taxes,* 1 Conn. Bar Journ. 154, dealing with the Connecticut decision in this case.

It appears very clearly from these cases that the principles adopted by the New York courts represent the general law throughout the United States and that the policy of the State of New York is followed sometimes in less and sometimes in greater degree by most of the states in the Union and that this policy is commonly supported and effectuated by the courts.

Special note is to be paid to the fact that Connecticut itself follows this rule when the question is a practical one.

Adams v. *Phelps,* 16 Conn. 127.

2. The situs of the property involved in these appeals, for the purpose of determining where its transfer was accomplished, was exclusively in New York.

We revert now to the second of the two theories by which a state of domicile justifies a tax on the transfer

of all of a resident decedent's personal property—the theory that the situs of all his personal property is at his domicile, and hence its transfer must be effected there and that transfer is subject to a tax there.

This theory has several obvious points of attack.

In the first place, this tax is on the succession to the property, not on the property itself. Hence it makes no difference where the property is, except for the purpose of determining where the transfer takes place. But as we have shown, it is clear in this case that the transfer took place in New York, and hence we have no occasion to inquire into the situs of the property to aid us in the determination of that question.

In the second place, whatever the general rule, the law of Connecticut is that the situs of the property is wholly immaterial. The Connecticut court insisted that the theory of the tax was the use of the law of the domicile in accomplishing the succession, and admitted that the property here involved had its situs outside the state and was not subject to its control; and quoted from many earlier decisions based on the same principle and making the same admissions (R. 62-64).

In the third place, in a case where determination of the situs could aid as to determine where the transfer took place, we would be interested in the question of situs only for that one particular purpose. There are different situs for different purposes; we do not care here what would be the situs for attachment, for determining validity of the assignment, or even for general property taxation.

Lastly, the argument that the situs of all intangibles is at the owner's domicile must rest upon the fiction *mobilia sequuntur personam*. But this fiction in its origin, we shall see, applied to tangibles, and indeed it was extended to intangibles only by analogy. So far as it applied to tangibles, it was overturned and discarded

by the decisions of this court in the *Union Refrigerator Transit* and *Frick* cases, both for purposes of general property taxation and transfer taxation. If it can be shown that the fiction, as applied to intangibles generally, or specifically to the transfer of the intangibles involved in these appeals, is false in fact and has ceased to do equity and has become an instrument of inequity, then just as those considerations resulted in the rejection of the fiction for tangibles, they should result in its overthrow as to intangibles. We believe that this falsity in fact and the resulting inequity can be demonstrated so far as the problem of this particular case is concerned. The fact that the transfer of this property was accomplished exclusively in New York, under New York law, by New York courts, as we have shown in the preceding argument, by itself is a most persuasive argument that the property had no situs in Connecticut, for if it had such a situs there, Connecticut surely could control its disposition.

These various considerations we shall develop in the subsequent argument. We think it best to recognize at the very outset that the law of situs is as intricate and confused as any branch of American jurisprudence. Substantially any theory of situs which we advance could be supported by the decisions of courts whose opinions carry weight; substantially any theory so advanced could be refuted by the decisions of courts of equal weight. Frequently the decisions of the same court will be inconsistent and this inconsistency may represent either a gradual change from one theory of situs to another, or it may represent a wavering allegiance to two different theories without recognition of the inconsistency. In this state of the law it is hardly possible to argue intelligently that any one theory definitely is the law and another is definitely wrong. But if we approach the subject by seeking to ascertain first what the law of situs was in its origin and what

conditions dictated the determination of the principles then accepted, and if we then study the gradual development of the law to determine whether and how those principles changed and whether and how they were affected by a change in practical conditions, and if finally we ask what are the conditions now, what ought to be the law of situs now, and how far the courts have gone under the influence of these new conditions in adopting new principles of situs and to what extent their reiteration of inconsistent principles is dictated by respect for precedent and the failure to appreciate the inconsistency, then we shall have gone a long way toward finding a path through the present maze and in determining the ultimate goal.

(a) THE MEANING OF SITUS.

First it is necessary to determine what we mean by the term "situs," and in this connection we shall also have to determine what is meant by "jurisdiction" and the relation of the two terms to each other.

Jurisdiction, and situs, and control, are, we think, inextricably intertwined with each other. In other words, they are different aspects or phases of the same factual situation. Where the property is, that locus controls it and has jurisdiction; where it is controlled, there it is, and jurisdiction exists; if jurisdiction exists, it is because control can be exercised and because the property is there.

If the rules of situs and jurisdiction and their practical application to various kinds of property are analyzed we see clearly on the one hand why situs and physical location are frequently confused and why in truth situs is determined by jurisdiction and that is determined by power of control.

Real estate has a fixed immovable location. Of all species of property it is subject to the easiest control. The jurisdiction exercised over it by the sovereign where

it is located is obvious. The officers of the state can step upon the land and occupy it physically, transfer its possession to whom they will and exclude the owner from it. It cannot escape from them; it cannot be moved. The physical power so to control the property, plus the constitutional right to do so, is jurisdiction, and it so happens that the place where that can be done—the situs of the property—is also its physical location.

The situation with relation to personal property which, nevertheless, is tangible in its character is very much the same. Here, to be sure, the property is capable of removal from a given spot and hence, properly or improperly, it can be transferred from one jurisdiction to another. Nevertheless, when it is at a given place, there can be very little question of the sovereign who has jurisdiction over it. It is the sovereign whose officers physically can control its use, seize it, take possession away from the owner, whose courts can issue decrees which can be made binding by physical force. It was property of this sort which was involved in the *Frick* case and it was because these elements of control existed that the Supreme Court of the United States found that the States of New York and Massachusetts, respectively, and not the State of Pennsylvania, had jurisdiction of the property involved and hence jurisdiction of the transfer.

But the physical location of tangible personalty is not always its situs. It happens occasionally that tangible personal property may be physically located at a given place and yet jurisdiction over it for certain purposes may be lacking. Thus, for example, personal property in transit through a state, there only temporarily, is not within the jurisdiction of the sovereign for the purpose of taxation or administration on the owner's death. On the other hand, the same property is within that jurisdiction for the purpose of seizure on attachment or execution. Accord-

ingly, the property has no situs in that state for tax and administration purposes, but it has a situs there for attachment and execution. This shows on the one hand the identity of situs and jurisdiction and control, and on the other, it shows what we suggested at the beginning of this discussion of situs, that there may exist a situs for one purpose at the one time and not for another purpose or at another time.

Despite these possibilities, however, it is probably true that in ninety-nine cases out of one hundred, control, jurisdiction and situs of tangible property coincide for all purposes with physical location and hence again there is added strength to the assumption so frequently made that situs is equivalent to physical location.

We know of no better expression of these principles than that by Charles E. Carpenter of the University of Illinois in his article on *Jurisdiction Over Debts,* 31 Harvard Law Review 905 (May, 1918). He says in introduction:

> "While physical power is recognized as the foundation of jurisdiction * * * still this fundamental principle has not always been kept clearly in mind and the failure to do so has produced a complex and confused state of the law where simplicity only need exist."
>
> * * * * * *
>
> **"Jurisdiction over tangible property is dependent upon the physical presence of the property, for it is at such place that the power of control exists. *But the important thing to observe is, that it is the power of control that is the basis of jurisdiction, and not location, and it is this power of control which gives whatever significance there is to the legal concept, 'situs.'***
>
> **"It is evident that the law for purposes of jurisdiction is not interested in the spatial quality of property, that is, the fact that the property has**

extension, or occupies space, except in so far as that quality affords the state the power of control over it. If the location, or situs, of tangible property gave no power of control, or if control could be exercised independently of situs, then we should never have 'situs' mentioned in connection with jurisdiction over property. Where the property is tangible in form, power of control and location coincide. (*Pennoyer* v. *Neff*, 95 U. S. 714 [1877].)

"Even here it is evident that it is power of control and not location that is the basis of jurisdiction. For the mere fact that the property is within the territory during the litigation is not enough; control must be taken at the time litigation is begun. (*Pennoyer* v. *Neff*, 95 U. S. 714 [1877].)"

Now when we come to intangible property the fact that this property is not suspectible of any physical location (except to the extent that the intangible right may be "clothed" in the form of an instrument) results in confusion so long as the prevailing notion is that situs has some relation to physical location. The confusion which has resulted and the key to the problem is ably described by Carpenter. Continuing in his article, he says:

"Where the property is intangible, however, this element of location is absent, but power of control may still exist and constitute the basis of jurisdiction. The failure to observe that it is this element of control, and not the quality of occupying space, that gives 'situs' its significance, has led to the greatest confusion in the decisions relating to jurisdiction over intangible property in the form of debts. A variety of views, mostly untenable, has developed as a result of the attempt to use 'situs' in the sense of location as applicable to debts. One view locates it, by means of the fiction *mobilia sequuntur personam*, at the creditor's domicil (*State Tax on Foreign-Held Bonds*, 15 Wall. [U. S.] 300 [1872]); another at the debtor's domicil (*Bragg* v. *Gaynor*, 85 Wis. 488, 55 N. W. 919 [1893]); a third,

considering it a light and nimble thing, finds that it may be located by legislative fiat at the debtor's domicil (*Minor, Conflict of Laws,* 287); a fourth considers a debt, since it is intangible, as being without situs (*Beale, Cases on Conflict of Laws,* Vol. III, 507, §25); a fifth, as having its situs determined in each case by the purpose involved (16 Harv. L. Rev. 63, note); a sixth, that it has two situses, an actual one at the domicil of the debtor, and a legal one at the domicil of the creditor (*Minor, Conflict of Laws,* §121); a seventh, that where the debt is in the form of a bond, note or other specialty, its situs is where the instrument is (*Bacon* v. *Hooker,* 177 Mass. 335, 337, 58 N. E. 1078 [1901]); and an eighth, which seems to be the more accurate view, that the situs of a debt is wherever the debtor can be found (*Harris* v. *Balk,* 198 U. S. 215 [1905]).

"*Bearing in mind this elemental fact that physical power is essential to jurisdiction over property and considering situs as the place where power of control can be exercised,* let us, in the light of the jurisdiction that is exercised over tangible property, consider the problems of jurisdiction over debts for the purpose of administration, garnishment, and taxation."

This last suggestion of Carpenter's solves, we think, much of the modern difficulty over determining the situs of intangible property for whatever purpose. Situs is control and jurisdiction is control, and while physical location of tangible property may co-exist with the place of control, it is not the determining element. As a result, the fact that intangibles have no physical location presents no new problem—there still remains to be determined only the question where control of the intangible can exist.

See also excellent discussion,

14 *Cal. Law Rev.* 225, especially 227-228,

and

Beale, *The Situs of Things*, 28 Yale Law Journ. 525.

The suggestion that control is the true test of situs is amply supported by decisions.

Savings Society v. *Multnomah County*, 169 U. S. 421.
Chicago, Rock Island etc. Ry. v. *Sturm*, 174 U. S. 710.
Blackstone v. *Miller*, 188 U. S. 204.
Buck v. *Beach*, 206 U. S. 392, 407.
Wheeler v. *Sohmer*, 233 U. S. 434, 446.
McDougald v. *Lilienthal*, 174 Cal. 698.
Adams v. *Phelps*, 16 Conn. 127, 135.
Wilcox v. *Ellis*, 14 Kan. 588.
Vinton v. *Sargent*, 195 Mass. 133.
Bliss v. *Bliss*, 221 Mass. 201, 204-205.
Welch v. *Treasurer*, 223 Mass. 87.
Hardware & Mfg. Co. v. *Lang & Co.*, 127 Mo. 242.
Matter of Swift, 137 N. Y. 77.
Matter of Houdayer, 150 N. Y. 37.
Matter of Scott, 129 Misc. 625.
Redmond v. *Commissioners*, 87 N. C. 122.

(b) SITUS OF INTANGIBLE PROPERTY FIXED BY THE ELEMENT OF CONTROL AT A POINT OTHER THAN THE OWNER'S DOMICILE IS RECOGNIZED BY THE LAW FOR MANY PURPOSES, INCLUDING THE EXERCISE OF THE POWER OF TAXATION.

Such an actual situs away from the domicile is recognized for many purposes—administration, attachment, execution and taxation of all kinds.

Continuing with his article, Carpenter takes up the existing law as to the situs of intangible property for various purposes.

Taking up first the question of jurisdiction of debts for purposes of administration, he shows that ancillary administration is granted by courts of a state where tangible property is located or where the debtor of a non-resident decedent is domiciled, because actual power of control over the property and the debt give jurisdiction. But if a debtor is a transient in the state, its courts will take no jurisdiction because of the uncertainty of its continuance; *only when the continuance of jurisdiction is reasonably certain will they exercise their power.* "Where the property is permanently located or where the debtor has his domicil, there the court has jurisdiction all the time, and if administration is granted, *the administrator can be practically certain of making use of the powers granted him*" (p. 909).

Taking up next the question of jurisdiction over debts for purposes of garnishment, he establishes here too that the test of jurisdiction for this purpose is the physical location and the control given by that physical location in the case of tangible personalty, and the control of the debtor and the control thereby given over the debt in the case of intangibles. His learned explanation of these principles is so complete that we forbear attempting to summarize it. He urges ably the practical aspects of the question of situs, the importance of changing conditions as modifying the rules of law and the need of emphasizing actuality rather than of adhering to tradition or theory.

It is not difficult to support his views by a reference to the decisions of the courts in this country in many branches of the law.

It is consistently recognized that the proper jurisdiction for the purpose of attaching an intangible right is that

where the debtor is to be found. This is the rule established by the State of Connecticut itself.

Barber v. *Morgan,* 84 Conn. 618.
Veeder Mfg. Co. v. *Marshall,* 79 Conn. 15.

In the *Barber* case a resident of Connecticut attached the property of a non-resident defendant in shares of stock issued by a Connecticut corporation, and the Connecticut court specifically held that the situs of the stock in the corporation was the place where the corporation was located, citing earlier Connecticut cases.

The same rule is applied consistently by the courts of other states.

Chicago, R. I. & P. Ry. Co. v. *Sturm,* 174 U. S. 710.
New Orleans v. *Stempel,* 175 U. S. 309, 321-322.
Jellenik v. *Huron Copper Mining Co.,* 177 U. S. 1.
Yazoo & Miss. Valley R. R. Co. v. *Clarksdale,* 257 U. S. 10.
DeBeam v. *DeBeam,* 115 Md. 668.
Hardware Mfg. Co. v. *Lang & Co.,* 127 Mo. 242.
State ex rel. v. *Leahy,* 193 Mo. App. 36.
Flynn v. *White,* 122 App. Div. 780.
People ex rel. Wynn v. *Grifenhagen,* 167 App. Div. 572.
Gen'l Motors Corp. v. *Ver Linden,* 199 App. Div. 375.
Catlin v. *Hull,* 21 Vt. 152, 160.

See also:

Eidman v. *Martinez,* 184 U. S. 578, 581-582.
Blackstone v. *Miller,* 188 U. S. 189.
26 *Col. Law Rev.* 605, especially 608.

The discussion in the first case cited, *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* is most enlightening, and the court says in summary:

> "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it you must go to the domicile of his debtor and can only do it under the laws and procedure in force there. * * * *Whatever of substance there is must be with the debtor. He, and he only, has something in his hands.*"

The same rule applies as to execution. The basic principle is enunciated in

> *Yazoo & Miss. Ry. Co.* v. *Clarksdale,* 257 U. S. 10.
> *Wait* v. *Kern River Mining Co.,* 157 Cal. 16.
> *Telegraph Co.* v. *Howell,* 162 Mo. App. 100.

Even more significant is the fact that the same principles have been applied and the same decision reached when the question has arisen out of administration of estates.

> *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394.
> *Warrior C. & C. Co.* v. *National Bank,* 53 So. (Ala.) 997.
> *Adams* v. *Phelps,* 16 Conn. 127.
> *Neal* v. *Boykin,* 132 Ga. 400.
> *Commonwealth* v. *Peebles,* 134 Ky. 121.
> *Vinton* v. *Sargent,* 195 Mass. 133.
> *Gray* v. *Lenox,* 215 Mass. 598.
> *Gregory* v. *Lansing,* 115 Minn. 73.
> *Ewing* v. *Warren,* 144 Miss. 233.
> *Re Ewing,* 6 Prob. Div. 19.

In all these cases it will be observed that jurisdiction over the property existed because the sovereign had the

power of control over it irrespective of the owner's domicile and that the situs of the property for the particular purpose involved was where that power of control could be exercised.

Further, an analysis of these cases shows that in the very great majority there was not at the time that jurisdiction was asserted by the sovereign involved concurrent power of control and jurisdiction in the sovereign of domicile. Where, for example, a debtor was found in a foreign state and served with process of attachment, it is quite obvious that he could not at that time have been subjected to service either at his own domicile or at the domicile of the creditor against whose claim the attachment ran. So as to execution cases. The question was even more pertinent in the administration cases and, of course, here we come into the very field which we discussed in the first part of this point. Those cases all give intangible rights a situs for purposes of administration at some point other than the decedent's domicile, and where there was involved assertion of jurisdiction both on the part of the state of domicile and another state, it was held that the latter, exercising the actual power to control the disposition of the property, had exclusive jurisdiction. Yet it must be obvious that if the situs of that property had been at the decedent's domicile it could have been controlled there.

When we turn now to the field of taxation we find it equally well settled that intangibles have a situs for tax purposes away from the owner's domicile. Many of these cases which we cite here go beyond this point and announce principles and rules which we believe unsound—they may recognize concurrent jurisdiction to tax by the sovereign

of domicile or may announce limitations on situs away from domicile which are not in accordance with the modern law. These other questions we shall discuss separately. We are concerned here only with the principle that such jurisdiction and control exist away from the domicile, that the intangibles have a situs away from it for tax purposes and the power of taxation can be effectively asserted. These cases include both property and transfer tax cases.

Supporting this statement are the following cases:

Bristol v. *Washington County,* 177 U. S. 133.
Blackstone v. *Miller,* 188 U. S. 189.
Selliger v. *Kentucky,* 213 U. S. 200.
Rogers v. *Hennepin County,* 240 U. S. 184.
McDougald v. *Lilienthal,* 174 Cal. 698.
Blain v. *Inby,* 25 Kan. 499.
Commonwealth v. *B. F. Avery & Sons,* 163 Ky. 828.
Welch v. *Treasurer,* 223 Mass. 87.
Matter of Jefferson, 35 Minn. 215, 218.
Johnson v. *Harrison Nav. Stores Co.,* 108 Miss. 627.
Finch v. *York Co.,* 19 Neb. 50.
Berry v. *Windham,* 59 N. H. 288.
Hoyt v. *Commissioners,* 23 N. Y. 224.
Redmond v. *Commissioners,* 87 N. C. 122.
Billinghurst v. *Spink County et al.,* 5 S. D. 84.
Robinson v. *Dover,* 59 Utah 521.
Catlin v. *Hull,* 21 Vt. 152.
Laidlay v. *Lord Advocate,* 1890 A. C. 468.
And see also cases *infra,* pp 88-89, 94.

It is evident from this citation of authority—and it could easily be multiplied tenfold—that intangible person-

alty is commonly given a situs both for general and transfer tax purposes away from the domicile of the owner.

Connecticut itself follows this course by express statute. Section 20 of the statute here involved, Chapter 190 of the Laws of 1923, provides in part:

> "The following property owned by a nonresident of this state at the time of his decease which shall pass by will or inheritance under the laws of any state or country, shall be subject to a transfer tax of two per centum of its fair market value upon the death of such owner: All tangible personal property, including moneys on deposit within this state; all stocks or obligations of any national bank located in this state or of any corporation organized or existing under the laws of this state; and any obligation of any resident of this state * * *."

(c) THE SITUS OF THE PROPERTY IN CONNECTICUT DEPENDS ON THE MAXIM *mobilia sequuntur personam*. THE HISTORY AND PURPOSE OF THIS FICTION AND ITS PLACE IN THE LAW.

We have now to inquire why there should be concurrent situs and jurisdiction for the purpose of taxation at the owner's domicile. What can be urged in support of such double taxation of intangibles? There certainly is an actual situs and an actual jurisdiction for taxation away from the domicile. Has the assertion that there is also a situs and jurisdiction at the domicile an actual basis of fact, too, or if it is a fiction, has it any equitable basis for surviving when the fact is recognized, too, or does it rest merely on the arbitrary declaration of the courts that that is the law?

It is to answer this question that we propose to examine as briefly as we can the origin of the fiction, its place in the law and the growth of the law of taxation.

The theory that the legal situs of a man's personal property is at his domicile rests on the fiction of the common law expressed in the maxim *mobilia sequuntur personam.* The fiction and the maxim date back to mediaeval days and conditions, as this and other courts have frequently noted.

Eidman v. *Martinez,* 184 U. S. 578, 581.
Pullman Co. v. *Pennsylvania,* 141 U. S. 18.
Catlin v. *Hull,* 21 Vt. 152, 159.

The fiction and the maxim have their place, not primarily in the law of taxation—indeed, it is doubtful whether until a late date they had any place in that law—but in the field of conflict of laws. They grew out of mediaeval conditions and mediaeval speculation on the law. When a property owner was under one sovereign, and the property under another, and another interested party under a third, perhaps, it was necessary to have some rule by which to decide what system of law should apply to the determination of rights in and disputes over that property. Quite obviously the sovereign with whom the property lay had the ultimate power, if he so chose, to apply his own law, and indeed so long as each nation had but one system of law the problem was of little practical importance. The sovereign controlling the property dealt with it according to his law. But when systems of federated states, as in the case of the Netherlands, or empires, as in the case of England, with distinct systems of law under one sovereign, began to make their appearance, then questions of conflict of laws became of vital importance.

Because of the peculiarities of the social and economic systems which existed then, the rules for determining conflict as to personal property took a different direction from those governing conflict relating to land. Land was the basis of wealth, of political economy, of the social structure. Toward it the attention of the law was particularly

directed. No sovereign could afford to surrender to any other the right to determine questions relating to land within his territory. So as to conflicts over land the rule always was that the law of the situs alone should govern.

Movables were different in many ways. The differences need not be analyzed. Probably the principal factor was that they were in no respect of the same importance as land. Suffice it to say that two schools of thought grew up, one referring questions relating to movables to the law of the owner's domicile, the other to the law of the situs.

Early English law followed the first school. Whether Huber was or was not its chief exponent, Prof. Lorenzen's treatise on his *Conflict of Laws* gives an excellent picture of the conflicting views, the adoption of the domiciliary theory in English law, and its scope.

> *Huber's de Conflictu Legum*, by Ernest G. Lorenzen, *Wigmore Celebration Legal Essays*, p. 199.

However satisfactory the maxim *mobilia personam sequuntur* may have been under simpler conditions, it is of little practical value now. It was always a mere fiction, a rule of comity, subject to any exceptions which the sovereign of situs might choose to make, and to his notion of proper policy. Because of its antiquity and the respect paid to its early sponsors, it is even now the recipient of constant tribute, but that tribute is little more than lip service. Perhaps the most graphic picture of the change in the law is to be found in an article by Wharton.

> *Late Works on Private International Law*, by Francis Wharton, 6 So. Law Rev. (N. S.) 680 (1880).

Commencing at page 686, he discusses the attitude of the modern law toward the old maxim, and says in part:

> "In the repudiation of another formula, equally venerable and equally absurd, it is a comfort to find the high authorities before us concur. *Mobilia sequuntur personam*, the old writers seemed to hold to be an assertion they were bound to make as a preliminary to the discussion of movables. It was a truism in which, however false in the concrete, every one concurred, accepting it as a sort of formal starting-point. It took, therefore, somewhat the same position in international exposition as does the maxim that all men are created equal, in political harangues. We know that no two men are created equal; that there never have been two men exactly alike, but that there are in each man specific qualities belonging to himself alone; yet, nevertheless, we make the assertion as a commonplace preliminary. So with regard to the maxim *Mobilia sequuntur personam*. There was a time when it may have been in a measure true, just as there is a time in early infancy in which two children may appear exactly alike."

Then he goes on to contrast the situation of personal property and of owners of such property in mediaeval times and now, and to illustrate the absurdity of the rule by half a dozen instances which he mentions (pp. 687-688).

Story is regarded as the American authority on conflict of laws. While he states the view that the rule *mobilia sequuntur personam* is a commonplace of Anglo-American law, yet every time that he undertakes detailed discussion of its application it immediately appears that the maxim is simply a fiction, subject always to such exceptions as the sovereign of the situs chooses to make, that in practice these exceptions are very frequent, *and that when these exceptions, based on fact, exist, the fiction necessarily is discarded.**

---

* It is interesting to note the stages of development as shown by the successive editions of his work. The eighth edition, printed in 1883, is so arranged that the text and numbered footnotes represent Story's own opinions as expressed in the first three editions, while the lettered foot-

See also comment in the following legal articles:

Beale, The Situs of Things, 28 Yale Law Journal 525, 528.

Seefurth, Recent Limitations on the Power to Impose Inheritance and Estate Taxes, 25 Col. Law Rev. 870.

Lorenzen, Extraterritorial Succession Taxes, 1 Conn. Bar Journal 154, 157-158.

Articles on Inheritance Taxation, 14 Col. Law Rev. 225, 228; 24 Mich. Law Rev. 50, 52.

Article discussing the weakness of the maxim, 40 Harv. Law Rev. 989.

It is useless for the purposes of this brief to follow the history of the rule in its various applications. The point is that the rule has no special place in the law of taxation, that it stands there as throughout the field of the conflict of laws simply as a fiction of the law and rule of comity, fair and equitable so long as it is the only rule controlling the property. When, however, another sovereign declares

---

notes represent additions both to text and citations by the editors of the subsequent editions. Speaking of the transfer of movables, Story himself says that they are determined by the laws of the owner's domicile, although he then proceeds promptly to notice exceptions, such as contracts relating to stocks and bonds where the law of the situs governs (pp. 542-543). But then to this discussion the later editor has added a most significant note, which begins:

> "(a) *Mobilia sequuntur personam.—The exceptions to the maxim mobilia sequuntur personam have become so numerous that it cannot be safely invoked for the decision of any but the simplest cases at the present day; if indeed a case can ever be safely decided upon a maxim.* The exceptions would probably be less frequent if the maxim were *lex situs mobilia regit.*
>
> *But no maxim is needed; any would be apt to mislead. The question is, how far will a state permit a non-resident* having personalty within its limits, or the creditors resident or non-resident of such a person, or the course of the foreign law under which the non-resident owner is domiciled, *to control that property; and this question should be decided upon its merits, uninfluenced by maxim.* The answer to the question will depend partly on the nature of the property and partly upon the mode of disposing of it or affecting it."

an actual situs elsewhere and acts on that declaration, then in every other field than that of taxation, it is admitted that the fact and fiction are inconsistent, and when the fact is recognized the fiction must be put aside. This rule should hold as well in matters of taxation as elsewhere. Courts frequently declare that it does. Case after case has made the declaration that the maxim represents only a fiction adopted from considerations of convenience and policy and that always it must yield to fact and equity. Its origin and limitations are well understood.

Deganay v. *Lederer*, 250 U. S. 376.
Liverpool etc. Ins. Co. v. *Assessors*, 221 U. S. 346.
Buck v. *Beach*, 206 U. S. 392.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395.
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.
Board of Assessors v. *Comptoire Nationale*, 191 U. S. 388.
Blackstone v. *Miller*, 188 U. S. 199.
Eidman v. *Martinez*, 184 U. S. 578.
Bristol v. *Washington County*, 177 U. S. 133.
Pullman Co. v. *Penn.*, 141 U. S. 18.
Bonaparte v. *The Tax Court*, 104 U. S. 592.
Kirtland v. *Hotchkiss*, 100 U. S. 491.
St. Louis v. *Ferry Co.*, 11 Wall. 423.
Wilcox v. *Ellis*, 14 Kan. 588.
In re Jefferson, 35 Minn. 215.
Parsons v. *Lyman*, 20 N. Y. 103.
Hoyt v. *Commissioners*, 23 N. Y. 224.
People ex rel. Jefferson v. *Smith*, 88 N. Y. 576.
Matter of Swift, 137 N. Y. 77.
Matter of Scott, 129 Misc. 625.
Redmond v. *Commissioners*, 87 N. C. 122.
Small's Estate, 151 Pa. 1.
Hostetter's Estate, 267 Pa. 193.
Catlin v. *Hull*, 21 Vt. 152, 159.

The attitude of the courts is well expressed in the following quotation from *Catlin* v. *Hull*, a leading case:

> "It is undoubtedly true, that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his *domicil;* and in general, any conveyance of chattels, good by the law of his own *domicil,* will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country, where the same is situated. *But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country, where the property is in fact, which contravenes the law of his domicil; for if there is, the law of the owner's domicil must yield to the law of the state, where the property is in fact situate.*"

(d) DEVELOPMENT OF THE LAW OF SITUS FOR TAXATION. THE SHIFT FROM *lex domicilii* TO *lex situs.*

All this being so, how may we account for the situation which exists in the law of taxation, recognizing one situs only for the taxation of tangibles, recognizing an actual situs away from the domicile for intangibles, but nevertheless declaring that intangibles also have a situs at the domicile and may be taxed there. We think that the explanation lies in the development of the law in the last half century, and that many state courts have already recognized the fact that the actual situs for intangibles precludes a fictional situs at the same time.

Before we study this development of the law two or three general observations are pertinent.

In the first place, the peculiarities arising out of our constitutional system are to be noted.

The sovereign in the true sense is concerned only with questions of power. If he has the property within his control he can do with it what he chooses. If he has the owner of the property within his control he can do whatever through force and duress he can persuade the owner to do. If the property is there fully subject to his control he can collect taxes from it; if the owner is there presumably he can exert sufficient pressure on the owner to make him pay taxes, though the actual money comes from some other source than the property to which the taxation relates. So as to the United States, though it is a sovereign of limited powers, it is not limited in its right of taxation to things within its territorial limits, but if a non-resident citizen owns property abroad, it may still tax him in relation to that property through its control over him as a citizen and in return for the protection and benefits afforded him and his property. The same freedom does not exist as between the states, because under our federal system of government, where the power of one state ends, the power of the other begins, and none may infringe on the rights of the others.

Cook v. *Tait*, 265 U. S. 47.
U. S. v. *Bennett*, 232 U. S. 299.

The law and the fact being established, as they are, that personal property, whether tangible or intangible, having an actual situs outside a state is beyond that state's control, then taxation can be levied on it only through control of the owner, or by impressing the decrees of its courts upon other property which the owner is unfortunate enough to have within its territory. Here our constitutional system comes into play. Control of the owner is enough for the full fledged sovereign; whether it is enough

for our states is a question to which this court appears to have given differing answers, saying sometimes that such a tax is really a tax on the property and hence forbidden, and at others that the tax, not being on the property, may nevertheless be measured by the property (compare *D., L. & W.* v. *Pa.* group, p. 84, with *Kirtland* case, *infra,* p. 86, and group commencing with *Kidd* case, *infra,* p. 91). As to the second possibility, this court has said definitely that the existence of other property within the jurisdiction is not sufficient justification for the imposition of a tax on property which itself is beyond the state's control (*supra,* p. 57).

In short, the power of a state ends at its borders, but just what that rule means in its application depends sometimes on what this court declares to constitute due process of law.

In the second place, we ought to recognize frankly why the fiction persists in the law of taxation beyond its limitations in other fields of the law. It is simply because in deciding between two private litigants, facts, equities and practical considerations are readily accepted, but in this question of taxation the recognition of these elements would result in a limitation of the field of taxation open to each state which its courts are unwilling to make. It is a serious responsibility for a court to say to its legislature that a system of taxation followed for years is unconstitutional. Few state courts undertook that responsibility in the field of general taxation of tangible property until they were driven to it by the decision of this court in the *Union Refrigerator* case; few undertook it in the field of transfer taxation of tangibles until this court rendered its decision in the *Frick* case. Yet the rule of the *Union Refrigerator* case now seems self-evident, and the rule of the *Frick* case, still protested by a few, is more and more accepted as stating an obvious proposition of law.

See discussion:

> Powell, *Extraterritorial Inheritance Taxation*, 20 Col. L. Rev. 283, 295-296.

In the third place, we think we ought to correct the fallacy which has been expressed in some cases that a tax levied where the debt can be controlled (when that is the place of the debtor's domicile) is based on the theory that it is on the debtor's property. Of course, that is not the theory of the tax at all. The tax rests on the property of the creditor, but is levied on it at the place where it is in fact, i. e., its situs, where it can be controlled.

Next we want to call attention again to the comparatively slight importance of situs in transfer tax cases if the place of the transfer can be determined irrespective of situs. This court itself said in *Eidman* v. *Martinez*, 184 U. S. 578, 589:

> "The actual situs of the property in such cases cuts but a small figure while in the case of general taxes upon such property it is now considered determinative of the whole question." See also *Lorenzen, Extraterritorial Succession Taxes*, 1 Conn. Bar Journal 154, 161.

Lastly, it must be remembered that in the field of taxation, as in every other field where it was applicable, the maxim *mobilia sequuntur personam* applied to tangibles and intangibles in exactly the same sense. This court has so declared.

> *Blackstone* v. *Miller*, 188 U. S. 189.
> *Buck* v. *Beach*, 206 U. S. 392.
> *Bristol* v. *Washington County*, 177 U. S. 133.
> *Eidman* v. *Martinez*, 184 U. S. 578, 582.

See also:

People ex rel. Jefferson v. *Smith*, 88 N. Y. 576.
Wilcox v. *Ellis*, 14 Kan. 588, 603.

With this signpost to guide us, it will be most interesting to inquire why, at this stage of the law, a distinction between the two has suddenly become apparent, and why the rules which for years were applied to tangibles and intangibles alike, were found to be unjust where tangibles were involved, but are still fair and sound for intangibles.

In analyzing the cases to show the growth of the law, it is not possible to group the cases with absolute certainty. The chronological factor cannot be ignored, but, on the other hand, it is not an absolute test. Dependence on different principles overlap in point of time. Nor is it true that because the apparently decided principle in one case relates it definitely to one group, that there are not in it features or declarations placing it in some measure in a different group. The confusion in the law is graphically described by Professor Powell, in his usual salty and somewhat disrespectful style:

Powell, Situs of Business Credits, W. Va. Law Quarterly (Jan., 1922).

The classification which we suggest is, therefore, purely relative but we think it is sufficiently accurate to indicate the changes in the law.

Since the law determining the situs of tangibles has consistently developed ahead of that relative to intangibles, we discuss it first.

The following cases recognize that tangible property has an actual situs for tax purposes where it is, but they

do not deny the continuance of a situs at the domicile at the same time, based on the fiction:

Coe v. *Errol*, 116 U. S. 517 (1886).
Maryc v. *B. & O. Railroad Co.*, 127 U. S. 117 (1888).

See also discussion of principle in

Pullman Co. v. *Pennsylvania*, 141 U. S. 18 (1891), especially the dissenting opinion.

Now, it must be remembered that at this point the struggle was not to avoid the fiction, but quite the contrary—it was assumed as a matter of course that the property had a situs at the owner's domicile and the question was whether there was any justification for recognizing its actual situs as well and permitting taxation there. Although the fiction was still recognized, these decisions are distinct steps away from it in that they recognize and rely on the fact. Only, as yet, the inconsistency of the fact and the fiction are not acknowledged.

For twenty years the law remained at this stage. The next steps were taken only in 1905 and 1906.

D. L. & W. R. R. Co. v. *Pennsylvania*, 198 U. S. 341 (1905).
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 (1905).

While the earlier decision seems to have established exactly the same principle, the *Union Refrigerator* decision is considered as the leading case. It held that the maxim *mobilia sequuntur personam* had yielded, so far as tangible property was concerned, to the fact of an actual situs having no connection with the owner's domicile, that this was an outgrowth of modern conditions, and that since a state could not tax property outside its

territory, and since tangibles physically beyond its boundaries were as much outside of the state as land similarly situated, the right founded on the fiction to tax the property at the domicile had been dissipated.

However, said the Court: *"This case does not involve * * * inheritance or succession taxes * * * which are controlled by different considerations."* For twenty years, therefore, the state courts continued to treat tangible personalty, so far as transfer taxes were concerned, as having a situs at the owner's domicile. The rule was reversed only under the compulsion of the decision in

Frick v. *Pennsylvania*, 268 U. S. 473.

The principles of that case are too recent to need elaboration. Turning, as it does, primarily on the declaration that the transfer takes place by the laws of the state having actual control of the property, it adds that that tangible property has but one situs, its actual location, for all tax purposes.

It will be observed that between the first and the last cases cited there elapsed a period of forty years. The principles established by the *Union Refrigerator* and the *Frick* cases may seem self-evident now but they were not enunciated so easily, and pending the decision of those two cases the state courts consistently relied on both the fiction and the fact to extend the field of taxation of their respective states as far as possible.

The course of the development of the law as to the situs of intangibles has been identical, except that the final step—the declaration that the actual situs of intangibles is exclusive so far as taxation is concerned—is not so definitely established. Nevertheless, there are weighty decisions already going the full distance.

So far as intangibles are concerned, we start again from the position that, by virtue of the fiction, they follow the

owner to his domicile. Now, where tangibles were concerned, anyone with eyes could see that they did not follow the owner to his domicile. The matter was not as simple where intangibles were involved. Because they are intangible, they have no actual location. Their situs must necessarily be a legal concept. They are the more easily identified, therefore, with the fiction; and it is the more difficult, first to establish an actual situs away from the domicile, and then to satisfy courts that this actual situs is in fact exclusive and is just as inconsistent with the fictional situs as in the case of intangibles. As a result, the allocation of an actual situs to intangibles was not reached in one step as it was with tangibles. It came from a cautious extension of the law based on successive experiments.

We ought to say that while, to shorten the discussion, we have treated the cases down to the last group as permitting the double taxation of intangibles, they do not all in fact make that declaration. A considerable number state principles sufficiently broad to establish an exclusive situs away from the domicile. We assume that the declarations did not establish an exclusive situs simply because concurrently there are other decisions permitting taxation of similar intangibles at the domicile.

In the first group from 1873 to 1898, we find four cases:

> *Tappan* v. *Merchants Bank*, 19 Wall. 490 (1873).
> *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (1879).
> *Bonaparte* v. *Tax Court*, 104 U. S. 592 (1881).
> *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421 (1898).

Of these four, the *Tappan* case and the *Multnomah County* case established situs away from the domicile, on the basis of a special localization of the property involved—in the one case stock, in the other case a mortgage debt—by virtue of state statutes. Both of these opinions

seem to be consistent with an actual situs exclusive of the domicile. Nor are the companion *Kirtland* and *Bonaparte* cases contrary, because, while both permit taxation at the domicile, the first is explicable as a personal tax, not on the property, but measured by the property; and the other by the fact, which the court points out, that there was no special statute establishing an actual situs away from the domicile.

We think the *Tappan* and *Multnomah County* cases were tentative ventures into allocation of a situs to intangibles. Commencing in 1899, however, this court found it practicable to establish a definite principle by which the actual situs of certain classes of intangibles away from the domicile might be tested.

New Orleans v. *Stempel,* 175 U. S. 309 (1899).
Bristol v. *Washington County,* 177 U. S. 133 (1900).
Board of Assessors v. *Comptoir National,* 191 U. S. 388 (1903).
Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395 (1907).
Liverpool etc. Ins. Co. v. *Assessors,* 221 U. S. 346 (1911).

It is of some importance to note that in establishing these principles, the court approved and followed the practice and the principles enunciated by a number of state courts at an earlier period.

In re Jefferson, 35 Minn. 215, 218 (1886).
Catlin v. *Hull,* 21 Vt. 152, recognized as the leading case (1849).
Redmond v. *Commissioners,* 87 N. C. 122 (1882).
Billinghurst v. *Spink County,* 5 S. D. 84 (1894).
Hoyt v. *Commissioners,* 23 N. Y. 224 (1861).

The experimental approach to this problem of finding when a situs away from the domicile could safely be declared is very evident in this group. In the *New Orleans* case, the elements of a "business situs" were said to be continuity of dealing, the investment, collection and reinvestment of funds, management by a resident agent and the presence of the evidences of indebtedness. Each successive case modifies these requirements a trifle. In the *Comptoire Nationale* case, the form of the evidence (checks) was less definite than usual. In the *Bristol* case the evidences had been in Minnesota but were removed especially to avoid taxation. In the *Metropolitan Life Insurance Co.* case the evidences were removed as soon as executed and returned only when necessary for the purpose of collection or similar use. In the *Liverpool Insurance Co.* case there was no evidence of the indebtedness at all but the intangibles were pure credits.

Before we leave this group of cases, it is essential again to note the importance of localization away from the domicile in the decisions reached. That, throughout, appears to have been the final test by which the actual situs was determined. Its importance we shall appreciate more fully when we come to discuss the localization of the intangibles involved in this case (*infra*, p. 103).

Based on the consideration of the business situs cases, it was evidently considered practicable to allocate an actual situs to any intangible property when it could be said to be sufficiently localized away from the domicile.

Corry v. *Baltimore*, 196 U. S. 466 (1905).
Hawley v. *Malden*, 232 U. S. 1 (1914).
Rogers v. *Hennepin County*, 240 U. S. 184 (1916).

In the *Corry* and *Hawley* cases, stock was localized at the domicile of the corporation. In the *Rogers* case, the intangible was localized at the seat of the grain exchange.

Coincident with the growth of this law of situs in property tax cases there grew up another class dealing with transfer taxation and likewise fixing an actual situs for intangibles away from the domicile.

Eidman v. *Martinez*, 184 U. S. 578 (1902).
Moore v. *Ruckgaber*, 184 U. S. 593 (1902).
Blackstone v. *Miller*, 188 U. S. 189 (1903).
Wheeler v. *Sohmer*, 233 U. S. 434 (1914).

It may seem, from the date of these decisions, that they were really an earlier development of the law than the property tax cases to which we have referred. But we think that this apparently earlier development is really explained by the fact that they rested upon a somewhat different principle. Because the tax involved was not directly on the property but was on the transfer of that property, they were not so much concerned with the situs of the property as a general proposition, as with the place where the transfer took place, and that, they said, was where the property could be controlled and administered, and declarations of its situs at that place were really incidental to the finding that the transfer took place there. So far as situs was involved, it was for a special purpose and was more easily located because of the certainty where the transfer occurred. The declarations in the *Eidman* and *Moore* cases are, of course, *dicta*, since construction of the statute involved lead the court to the conclusion that no tax was intended. But the same principles were applied in the *Blackstone* case to a bank account, resulting in its taxation at an actual situs, and when that decision is read in connection with the explanation of the concurring judges in the *Wheeler* case, it is evident that the place of transfer was of major importance in determining what was said about the situs of the property.

All of these cases are, we think, successive steps in the attempt to escape from the restraining hand of the fiction and permit taxation in accordance with the actual and obvious fact of control and situs away from the domicile. In all of the cases it will be noted how easily and thoroughly the intangible involved could be localized at the point where a situs was given. Situs was determined on precisely the considerations which we have emphasized. Where can the obligation be enforced? To what jurisdiction can one turn for aid in its collection and realization? Can the jurisdiction attempting to levy the tax lend any aid in its enjoyment? Can it afford any measure of protection? These are the questions by which the actual jurisdiction of intangibles was determined. Where protection and enforcement are granted, there and at that point only, the intangible obviously is, said the courts. Contrary to the fiction, it does not in fact follow the creditor, for where the creditor is, no single right in the intangible can be enforced.

We do not know that the reason for this rule is stated more clearly or succinctly than in *Redmond* v. *Commissioners*, 87 N. C. 122, where the court says:

> "Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicil. It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing.
>
> "The actual situs and control of the property within this state, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged,

> that it is deemed to follow the person of the owner, and to be present at the place of his domicil, has no application. In such case, the maxim *mobilia personam sequuntur* gives way to the other maxim *in fictione juris semper aequitas existat.*"

Since this development of the law, if we are right in our analysis, simply parallels the development of the law in relation to tangibles, we ought not be surprised to find that, coincident with these cases, there are others permitting taxation of similar intangibles at the owner's domicile—that the law has not yet fully shaken off the hand of the fiction. It recognizes the fact, but tentatively, not with sufficient certainty and force to declare the fiction inconsistent. Accordingly, there is a line of decisions permitting taxation of intangibles at the domicile of the owner.

Kidd v. Alabama, 188 U. S. 730 (1903).

Fidelity & Columbia Trust Co. v. *Louisville,* 245 U. S. 54 (1917).

Cream of Wheat Co. v. *Grand Forks,* 253 U. S. 325 (1920).

Citizens National Bank v. *Durr,* 257 U. S. 99 (1921).

Bullen v. *Wisconsin,* 240 U. S. 625 (1916).

See also *dictum* in

Rhode Island Hospital Trust Co. v. *Doughton,* 270 U. S. 69 (1926).

The foregoing cases might well be explained by their place in the development of the law, but as a matter of fact we think there is an additional ground of distinction. The first four cases were all property tax cases and to some extent at least rest on the theory that a state where a man lives might levy a personal tax on him measured

by the total value of the property which he owned. In the *Kidd* case there were stock certificates at the owner's domicile which could be reached. The *Rhode Island* case, of course, is purely *dictum*, and the *Bullen* case we shall discuss separately at a later point (*infra*, p. 99).

Now, it seems to us that the law dealing with the situs of intangibles has reached exactly the stage of that dealing with tangibles just before the decision of the *Union Refrigerator* case. Experience and practice have shown the practicability of allocating a definite situs to such intangibles as are involved in these appeals and in the cases cited. Why, then, if those intangibles have an actual situs, does not that actual situs exclude a situs based on fiction at the domicile?

We have shown how the fiction was one of convenience and comity, never an absolute rule, but always subject to exceptions made to it by the law of actual situs. In exceptional cases it may also be a rule of equity. In *Southern Pacific Co.* v. *Kentucky*, 226 U. S. 62, the court was confronted with a case where tangible property, steamships, had no permanent actual situs and, lacking the application of the fiction, the property would have escaped taxation entirely. That case clearly suggests the proper place of the fiction in the law.

The *Union Refrigerator* case rests squarely on the fact that the state can tax only such property as is within its boundaries. Where tangible property physically is outside, it was held to be beyond the jurisdiction of the state, the legal situs and the actual situs coinciding. But we have already shown that the situs of the tangibles at the place where they exist physically is merely a coincidence—that, really, situs is determined by control. Now, if intangibles can be given so definite a situs away from the domicile, how can they exist at the same time at the domicile? There are no more two pieces of property than there are

in the case of tangibles. The intangible no less has a situs away from the domicile because it cannot be seen or touched. Where it is, is a matter of legal concept and declaration, but when this court says that it is located in a state away from the domicile, how can it be at the domicile at the same time? The suggestion in the *Cream of Wheat* case, that double taxation *per se* is not constitutional, does not seem to us to meet the issue. We are not concerned here with double taxation as such. *We are concerned with the declaration that two things exist in two places when, in fact, there is only one thing and it can be only in one place.*

While double taxation as such is not unconstitutional, neither is it a factor to be ignored. If it is clear that two states have equal jurisdiction over a subject of taxation—as, perhaps, in the case of the stock of a Connecticut corporation in this case—then it must be granted that neither need yield to the other. But certainly those cases ought to be exceptional, and the fact that two states claim equal jurisdiction ought to induce close scrutiny of the claims to determine in fact whether both can be justified. The court, in the *Frick* case, quoted from the *Union Refrigerator* decision as follows:

> "The adoption of a general rule that tangible personal property in other states may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other states or even in foreign countries, and of stocks of goods and merchandise kept at branch establishments when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the state where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the state,

and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection."

For an excellent study of these principles, see the articles *Validity of Inheritance Taxation Measured in Part by Value of Foreign Personalty*, 39 Harv. Law Rev. 250, and Beale's *Progress of the Law, 1923-1924, Taxation*, 38 Harv. Law Rev. 281, 283, and also thorough discussion in Powell, *Extraterritorial Inheritance Taxation*, 20 Col. Law Rev., at p. 289 *et seq.*

The arguments and the economic considerations set forth apply ten-fold to intangible property, now so much more important both in amount and use than tangible property.

With the determination that intangibles can have an actual situs away from domicile, the obvious evil and injustice of permitting them to be taxed in two places, the inconsistency of the fact and the fiction, and the fact that in every other branch of the law where the fact appears the fiction yields, it would be most surprising if we did not find decisions holding that intangible property had a situs exclusive of any other situs based on the fiction. Such cases we find.

Louisville & J. Ferry Co. v. *Kentucky*, 188 U. S. 385, 395 *et seq.* (1903).
Wilcox v. *Ellis*, 14 Kan. 588 (1875).
Fisher v. *Commissioners*, 19 Kan. 414 (1877).
Poppelton v. *Yamhill County*, 18 Ore. 377 (1890).
Hoyt v. *Commissioners*, 23 N. Y. 224 (1861).
Taylor v. *St. Louis County*, 47 Mo. 594 (1871).
Commonwealth v. *Avery & Sons*, 163 Ky. 828 (1915).
Berry v. *Windham*, 59 N. H. 288 (1879).
Laidlay v. *Lord Advocate*, 1890 App. Cas. 468.

Compare also:

> *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567 (1926).

In the *Louisville Ferry* case, the question arose whether Kentucky, the state of incorporation, could levy a tax upon the entire property of the corporation, *including a franchise granted by the State of Indiana,* on the theory that the corporation was domiciled in Kentucky and all its property followed it. The United States Supreme Court declared that Kentucky could not tax the Indiana franchise:

> "There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax the property right, *an incorporeal hereditament, which has its situs in Indiana.* While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, *that power is limited by a principle inhering in the very nature of constitutional government, namely that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government*" (citing cases).

This case, since its decision, has been rested on the ground that the intangible property involved was an incorporeal hereditament of the nature of real property, and therefore its situs was to be determined by special rules. All this may be true. But, nevertheless, the decision means that, having intangible property linked for some particular reason with a particular locality away from the owner's domicile, its exclusive situs is there, and we contend that precisely the same reasoning, applied to intangible property involved in the present case, gives it as definite a situs outside Connecticut and in New York, which by the same reasoning should be exclusive.

In *Wilcox* v. *Ellis, supra,* a leading case, cited with approval by the United States Supreme Court in *New Orleans* v. *Stempel,* 175 U. S. 309, at 318, a resident of Kansas had loaned money in Illinois, secured by notes. The notes were located in Illinois and payments were made there. The question was whether Kansas could tax this debt as property attached to the person of the creditor.

> "Then what is there in Kansas to be taxed? Certainly no tangible property; and not even any intangible property that needs any protection from our laws. Everything is and has been in Illinois—the consideration for the notes, the notes themselves, the place of payment, the persons to whom the notes are to be paid, and presumptively the payors, and the funds which must be used in paying the notes, all are in Illinois and have never been in Kansas. Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas except that the owner of the notes resides in Kansas. Every act which brought the notes or the debt into existence was performed in Illinois, and every act that may be performed in the future for their collection, payment, or extinguishment, must also be performed there. The claim that said debt is taxable in this state is founded entirely upon the maxim, *Mobilia sequuntur personam.* Under this maxim it is claimed that movable property follows the *residence* or *domicile* of the owner (not his *person*), and therefore that personal property may be taxed at the residence of the owner wherever he may be, and wherever the property may in fact be. *This maxim would seem from its terms to apply to all movable property, tangible as well as intangible, and it is generally so applied wherever it is applied at all.* But the defendant desires to make a distinction. While he seems to admit that by the weight of judicial determination the maxim does not fully apply for the purposes of taxation to tangible movable property, yet he nevertheless claims

that it does apply with all its force to intangible personal property. We think, however, he is mistaken. *The weight of judicial authority seems to be that for the purposes of taxation the maxim does not fully apply even where the property is intangible. People* v. *Gardner*, 51 Barbour, 352; *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Trustees, &c.*, 48 N. Y. 397; and other authorities cited in plaintiff's brief. This maxim is at most only a legal fiction; and Blackstone, speaking of legal fictions, says, 'This maxim is invariably observed, that *no fiction shall extend to work an injury*, its proper operation being to prevent a mischief, or remedy an inconvenience that might result from the general rule of law.' (3 Blackstone Com., 43.) Now as the state of Illinois and not Kansas must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois and not Kansas should tax it, and that we should not resort to legal fictions to give the state of Kansas the right to tax it."

It is unnecessary to discuss the other cases at length. These two are typical. There are, of course, cases declaring contrary principles. We said at the outset that the decisions were most contradictory and difficult to analyze. Without the key to the growth of the law, it would be wholly impossible to reconcile the declarations even of a single tribunal such as those of the United States Supreme Court. But when it is remembered that in the middle of the last century the courts started from a doctrine that all personal property, tangible or intangible, had its situs with the owner, that gradually there became apparent the present inequity of that rule and the practical difficulties which it offered in modern commercial life, that it was first held that tangible property had a situs at the point of its physical location and then that intangible property

had a situs where the obligation could be controlled, that originally both classes of property were held subject to double taxation and that then the courts saw the injustice of this and laid down the rule that tangible property could be taxed only where it was located, we have a key which explains the apparent contradictions to be found throughout the reports.

Blackstone v. *Miller,* 188 U. S. 189 is sometimes urged as an authority against our view, but it is not such in fact because the tax permitted was by the jurisdiction of actual situs. In any case, it rests its entire decision upon the analogy between tangible and intangible property and their situs.

> "To come closer to the point, no one doubts that succession to a *tangible chattel* may be taxed wherever the property is found, and none the less, the law of the situs accepts its rules of succession from the law of the domicile, or that *by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there*" (p. 204).

Again:

> "We perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim, *Mobila sequuntur personam, has no more truth in the one case than in the other*" (p. 206).

The case was obviously decided at a time when the court either permitted the double taxation of tangible chattels or still supposed that there was a distinction between a tax on the transfer of chattels and on the chattels themselves. *Both of these principles are squarely and expressly*

overruled by the Frick decision. They are no longer the law.

So in *Bullen* v. *Wisconsin,* 240 U. S. 625, the Supreme Court upheld transfer taxation of certain property by the state of domicile which had already been taxed by the state of situs. But it will be found that the whole decision rests upon the treatment of personal property as a part of a *universitas* and upon the assumption that it is necessary to invoke the law of domicile to complete the transfer, and hence the state of domicile has jurisdiction of the transfer though not of the property. *This principle is categorically overruled by the decision in the Frick case.*

As the court says in the *Frick* decision:

> "The power to regulate the transmission, administration and distribution of tangible personal property on the death of the owner rests with the state of its situs and that the laws of other states have no bearing, save as that state expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own" (citing cases).

In other words, the question of taxation of a transfer, equally with that of the property itself, is dependent upon jurisdiction and there is no jurisdiction of the transfer unless the act of transfer depends upon the laws of the given state or unless its courts administer the property. In this respect, no distinction is possible between tangible and intangible personalty.

Again, referring specifically to the New York and Massachusetts statutes controlling the personal property involved, the court says that these statutes

> "do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it."

And to bring the case even more closely in point with the present one, it continues:

> "And it should be observed that here the property was administered in those courts and none of it was taken to the domiciliary state."

This is the very situation which exists in the present case, where the State of New York is actually administering the great majority of the decedent's property.

In so far as the *Bullen* case depends on the theory of a *universitas*, there again it is reconcilable with the *Frick* decision because the principle of a universal succession knew no distinction between tangible and intangible personalty.

True, the *Bullen* case is mentioned in the *Frick* decision without express disapproval. But our question was not at issue in the *Frick* case, and the quotation we have given from the *Union Transit* case (*supra*, p. 85) indicates how little such expressions are to be given weight. The *principles* of the *Frick* and *Bullen* cases are inconsistent.

Then following the *Frick* decision this court rendered its decision in *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567. The property involved in that case consisted of securities. Those securities were in Massachusetts. They were held there by trustees subject to the exercise of a power of appointment. The power of appointment was exercised in North Carolina. Nevertheless, it was held by a majority of this court that the transfer depended wholly for its effectuation on the laws of Massachusetts, and accordingly it was taxable there only. This decision, dealing with precisely the same class of property which was involved in the *Bullen* case, must, we think, be deemed to impeach the principle of that case, and accordingly, to fix the situs of the property involved in these appeals, both for the purpose of determining where

the transfer took place and where it could be taxed, exclusively in the State of New York.

The whole argument is summed up by Carpenter, from whose article we have already quoted. Following his analysis of the decisions, to which we have referred, he goes on to show that the American theory of taxation requires that there be rendered some equivalent of protection, service or benefit in return for the tax exacted, that this cannot be given as to a particular piece of property unless the property is present and subject to control, and that this principle is true as to succession taxes as well as direct taxes (pp. 918-920, citing a long list of cases of the United States and state courts). He points out the fallacy of resting the succession tax upon the supposed privilege given by a state of domicile in permitting the transfer of property located in another state, and his criticism made in 1918 is precisely that adopted as a controlling principle of law by the United States Supreme Court in 1925 in the *Frick* case (pp. 920-922). He then develops his basic contention that since the underlying principle of taxation is protection, service or benefit, these are given only in the state of the debtor's domicile and that alone has jurisdiction to tax. He criticizes the fiction *mobilia sequuntur personam* and says very aptly, "But this fiction can hardly be urged as a ground or justification for the tax. *It is rather a form of stating a result reached and an admission of the non-existence of a reason.*" He shows how often it yields to fact in the decisions of the courts (pp. 923-929). He summarizes his study and conclusions in the following language, which seems to us as a matter of common sense and justice unassailable:

> "Finally there seems to be no reason that can be urged in support of a property or succession tax upon debts at the creditor's domicil that cannot be equally urged to support such a tax against an

owner at his domicil on foreign-held real and tangible personal property. * * * If the property or debtor is outside the jurisdiction there seems to be no essential difference in the power of control over the property from that over the debt or in the protection afforded to the owner of the property from that afforded the owner of the debt by the sovereign of his domicil. If, therefore, a tax at the owner's domicil cannot be supported in case of foreign-owned real estate and chattels, it is difficult to see how it can be supported on other than historical grounds against a creditor at his domicil on debts owed by a foreign debtor.

"On the other hand, every reason which goes to support the taxation of real and tangible personal property at its situs can be urged in support of a tax upon debts against the creditor at the debtor's domicil. The real reason why tangible property is taxable at its situs is not that it occupies space there, but that the sovereign where it is located can exercise control over it there, and thus afford it the protection for which the tax is exacted. In like manner the sovereign of the debtor's domicil has control over the obligation, by having jurisdiction over the debtor, and protects it and the debtor, and makes the debt valuable to the creditor. It profits the foreign creditor as respects the debt in the same way it does the foreign owner of tangible property within its jurisdiction. And in like manner such state and such state alone should be the one to levy the tax."

He is not alone in these views. Not only has the *Frick* case received general commendation, but the necessity of logically extending its principles to intangibles upon the same principles that we have set forth above has been very forcefully advanced.

> Seefurth, *Recent Limitations on the Power to Impose Inheritance and Estate Taxes*, 25 Col. Law Rev. 870, 875.

Beale, *Progress of the Law, 1923-1924, Taxation*, 38 Harv. Law Rev. 281, 283.
Articles on Inheritance Taxation, 24 Mich. Law Rev. 50, 52-53; 14 Cal. Law Rev. 225, 227-228.
Powell, *Extraterritorial Inheritance Taxation*, 20 Col. Law Rev. 283, 303-306.
Lorenzen, *Extraterritorial Succession Taxes*, 1 Conn. Bar Journal 154, 164-170.

(e) THE SITUS OF THE PROPERTY INVOLVED IN THESE APPEALS IS, FOR THE PURPOSES OF THIS CASE, EXCLUSIVELY IN THE STATE OF NEW YORK.

There can be no question that the intangible property involved in these appeals—partnership interest, insurance policy, bank account and stocks—had its actual situs, at least for the purpose of transfer and succession taxation, in New York. Whether during the decedent's lifetime the value of this property could have served as a measure of a personal tax imposed on him at his domicile, is beside the point. The decedent is beyond the reach of the State of Connecticut; any right it now possesses must relate to the transfer, or to the property as such.

The fact that all this property had a situs in New York is well settled by law. It is equally evident as a matter of fact, and this analysis of the fact shows, too, how truly the situs of the property in New York is exclusive.

Here we come again to the principle of localization which we showed was the determining factor in the development of the law of intangibles. It will be observed that every one of the interests involved in this case is just as susceptible of a definite allocation to a particular community as the ferry franchise in the *Louisville Ferry* case, *supra*. There is no reasonable ground for distinction between the fact that that franchise was connected with

realty and these interests are not. The weakness of the historical distinction we have pointed out. The interests were all here in New York subject to control here and here alone, connected definitely with New York County, and as a matter of fact and common sense having no substantial connection with any other place.

PARTNERSHIP.

The decedent's interest in the partnership is an obligation due from the surviving partners to the executors of the estate. If any question of enforcing this right arises, the courts of New York alone can give relief. The executors are there, the partners are there, the property so far as it has physical existence is there. There is in the State of Connecticut, out of over three and a half million dollars in partnership assets, a total of thirty-three hundred dollars, represented by accounts receivable from Connecticut debtors (R. 8-9, par. 9). This thirty-three hundred dollars is the sum total of the property as to which the State of Connecticut can exercise control. If the partners and the executors agree between themselves, they can make whatever disposition they wish of the decedent's interest in the partnership and the State of Connecticut cannot stop them, and it can give no other party any right which will be recognized or enforced by the courts of New York, to which such parties ultimately must have recourse.

It is well settled in New York and elsewhere that the situs of a partnership interest, whether in the hands of a living partner or due from surviving partners to his representatives, is where the partnership interest is.

See cases cited *supra*, page 42, and in addition:

Tappan v. *Merchants Bank*, 19 Wall. 490, 503;
Matter of Bijur, 127 Misc. 206;
Bliss v. *Bliss*, 221 Mass. 201;
Small's Estate, 151 Pa. 1;
Laidlay v. *Lord Advocate*, 1890 App. Cas. 468;
Commissioner v. *Salting*, 1907 App. Cas. 449;

and compare

Rogers v. *Hennepin County*, 240 U. S. 184;
Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60;
Citizens Nat'l Bank v. *Durr*, 257 U. S. 99, dissenting opinion;
Shaw v. *Hartford*, 56 Conn. 351;
Jollier v. *Rascoe*, 62 Miss. 69,

dealing with the situs of a business.

INSURANCE AND BANK ACCOUNT.

The life insurance policy and the savings bank account, each owed by New York corporations and physically in New York, are in the same situation. The State of Connecticut must find it utterly impossible to lay a hand upon either of these items, to aid in their enjoyment, or to interfere with their disposition. The State of New York, on the contrary, by its control of the debtor corporations, had plenary jurisdiction of the debts.

See cases cited *supra*, page 42, and in addition:

Matter of Scott, 129 Misc. 625.
Pope v. *Hartford*, 82 Conn. 406.
Ewing v. *Warren*, 144 Miss. 233.

STOCK.

Similarly as to the stocks owned by the decedent. Leaving aside the three shares of Stamford Theatre stock valued at $120, the State of Connecticut could exercise not the slightest control over any of these corporate stocks. The certificates themselves were physically in New York and again subject to the control of that state, because its officers could take physical possession of them. The very great bulk of the stock owned by the decedent at the time of his death was in New York and New Jersey corporations. Out of a total value of $277,984.25 the New York and New Jersey stocks were valued at $269,098.75. The only other items of stock were forty-seven shares of the Canadian Bank of Commerce, valued at $8,765.50, and the three shares of Stamford Theatre stock at $120 (R. 25-26; Exh. B). The significance of the ownership of New York and New Jersey shares lies in the fact that each of those states has adopted the Uniform Stock Transfer Act, *under which the stock certificate is in substance the property owned by the stockholder* (Laws of New York, 1913, Chap. 600, Personal Property Law, Art. 6, Secs. 162-185; Laws of New Jersey, 1916, Chap. 191). So far as the New York stock is concerned, it is obvious that the situs of the property is in New York in every sense. Both the corporations and the certificates are here. So far as the New Jersey stock is concerned, under the old rule there might have been a situs for taxation in New Jersey on the theory that that state could control the transfer of the stock by controlling the corporation, but New Jersey by its adoption of the Uniform Act has surrendered that right and the entire transfer must depend on the state where the certificates are located. It may be that the Canadian stock has a situs in Canada for tax purposes based on the old rule, but it is equally certain that so far as the United States are concerned, New York alone con-

trols the transfer and other dealings with the certificates and Connecticut has no power over any of the stock certificates whether they be of New York, New Jersey or Canadian corporations.

Under these circumstances, it is clear that the stock has its situs in New York.

See cases cited *supra*, page 43, and in addition:

Tappan v. *Merchants Bank*, 19 Wall. 490.
Corry v. *Baltimore*, 196 U. S. 466.
Hawley v. *Malden*, 232 U. S. 1.
Baker v. *Baker Eccles Co.*, 242 U. S. 394.
De Ganay v. *Lederer*, 250 U. S. 376.
Disconto Gesellschaft v. *U. S. Steel Corp.*, 267 U. S. 22.
Warrior C. & C. Co. v. *National Bank*, 53 So. 997.
McDougald v. *Lilienthal*, 174 Cal. 698.
Bliss v. *Bliss*, 221 Mass. 201.
Welsh v. *Treasurer*, 223 Mass. 87.
Ewing v. *Warren*, 144 Miss. 233.
People ex rel. Wynn v. *Grifenhagen*, 167 App. Div. 572.
Stern v. *The Queen* (1896), Q. B. 21.
Situs of Corporate Shares, Mich. Law Rev. (Feb., 1927).

3. Other elements in the theory of taxation: Protection; certainty of discovery.

One of the principles often stated as fundamental in the American theory of taxation is that benefit and protection on the one hand and the right of taxation on the

other are co-relative. If the first exists, so does the second; if the first is absent, the second falls.

Tappan v. *Merchants Bank*, 19 Wall. 490.
Corry v. *Baltimore*, 196 U. S. 466.
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.
Shaw v. *Hartford*, 56 Conn. 351.
Veeder Mfg. Co. v. *Marshall*, 79 Conn. 15.
Bridgeport Projectile Co. v. *Bridgeport*, 92 Conn. 316.
Taylor v. *St. Louis County Court*, 47 Mo. 594.
Matter of Romaine, 127 N. Y. 80.
Redmond v. *Commissioners*, 87 N. C. 122.
Small's Estate, 151 Pa. 1.
Hostetter's Estate, 267 Pa. 193.
Catlin v. *Hull*, 21 Vt. 152.

Aside from the fact that the State of Connecticut extended no protection or benefit to the transfer in this case because that took place under New York law, nor to the property which was transferred because the control of that property was vested in other states, there are certain additional features bearing on these which are peculiar to this case.

This is not the ordinary case of a decedent's estate administered at his domicile by resident executors for resident beneficiaries. It is distinguishable in every feature. The executors are not in Connecticut. The property is not there. The transfer does not take place there. The beneficiaries are not there. The property will never be subject to the direction of the Connecticut court, but will be administered and distributed finally by the New York court. Every element of the usual situation is absent in the present case. Every feature is a distinguishing one and there is no conceivable point along the line of the whole trans-

action where the State of Connecticut has either the physical power to interfere in the transfer nor the opportunity to confer on the executors, the beneficiaries or the property any benefit or protection in return for which it might demand a tax.

We know of only one more argument directed to fact to show why the transfer of intangible property should be subject to a tax at the owner's domicile. This argument is directed to the physical intangibility of the property and is supposed to be equally applicable whether the tax is a general property tax or on the transfer of property.

It is said that since intangible property is by its nature invisible, it is incapable of discovery apart from its owner and if it is not taxed there, it will escape taxation entirely. It was said in the *Union Refrigerator* case, *supra*, as the ground for distinguishing the property there involved from intangibles:

> "Respecting this there is an obvious distinction between tangible and intangible property and the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except perhaps in the case of mortgages or shares of stock. So if the owner be discovered there is no way by which he can be reached by process in a state other than that of his domicile where the collection of the tax otherwise is forced."

Whatever may have been the fact when the *Union Refrigerator* case was decided, it has since been found that intangibles can be discovered away from domicile and can be reached there for taxation. Like many arguments, this one has an air of plausibility, but it is in truth fallacious.

To begin with, it is controverted by the innumerable cases in which intangibles *have* been found and a situs given them.

But to analyze the argument anew, since the property is invisible apart from its owner, it is invisible with him, and if it cannot be discovered by search in the one case, neither can it in the other. As a matter of practical necessity, tax officials depend for its discovery either upon the truthfulness of its owner or upon report from some other sources, and they are as apt to discover the fact of its existence from the debtor as they are from an owner. In fact, the likelihood is greater, as is evidenced by the common provision in the inheritance tax statutes penalizing a corporation or other debtors or holders of intangible property for permitting access, or making transfer of that property, to the decedent's successors until the tax is paid. The self-interest of the owner may persuade him to risk a penalty rather than report such property, while there is no gain to a debtor in concealing property upon which another must pay the tax.

In the second place, a great bulk of these so-called intangible items are clothed with an outward form. Bonds, stock certificates, notes, trade acceptances, of all such this is true. To be sure, they are somewhat easier of concealment than furniture and goods, but as a matter of plain fact, again, it is ridiculous to suppose that the taxability of these tangible pieces depends upon their visibility. No court at this day will suppose that the tax gatherer invades every home and every business to see with his own eyes what is there. He depends upon reports. If he is informed that the report is wrong, he investigates. As a matter of fact we think it is notorious that the taxation of *tangible* personal property belonging to individuals at the present time is not a matter of certainty and appraisal, but rather one of estimate.

So far as the tax collector depends upon information and investigation, such information is as likely to be received and such investigation is as simple under modern

conditions for intangibles as for tangibles. This court will not ignore the fact that the great bulk of intangible property owned by a decedent is represented by securities or other claims which have tangible evidence. The State has many points at which it can safeguard its interests. It can prevent the opening of a safe deposit vault by the decedent's representatives by a penalty imposed upon the safe deposit company. It can prevent the transfer of corporate stocks by penalty imposed upon the corporation. It can prevent the payment of any and every other debt by penalty imposed upon the debtor—subject, of course, to the very significant limitation that it cannot impose these penalties and this control if the debtor or possessor of the securities is outside its jurisdiction, but the sovereign where he is *can* exercise this control. That shows where the property is. And eventually, if the argument of possible concealment and fraud is advanced, the State is driven back to the fact that this concealment and fraud are as possible and much more profitable to the owner than to the debtor.

But the best answer to this fallacious argument of invisibility is to see what is actually done. Let us examine the records of our leading commercial states in this respect; and since in fact these provisions are too many to review in full, let us confine ourselves to those dealing with the taxation of the *transfer* of intangibles by non-residents.

The State of Connecticut itself, by Chapter 190 of the Laws of 1923, in Section 20 imposes taxes upon certain intangibles of a non-resident where the State has control of the debtor. By Section 17, any person who without the consent of the Tax Commissioner pays over any property subject to the succession tax, renders himself liable to three times the amount of the tax, and by Sections 22 and 23, this penal provision is applied to the property of non-residents as against any person in possession or control

thereof. The State of Connecticut seems to have little doubt of its ability to find intangibles or of the method by which their discovery can be facilitated.

The State of New York, by Section 248 of the Tax Law in its present form likewise purports to tax certain intangible property of non-residents. By Section 227, any safe deposit company, trust company, corporation, bank or other institution or person who has possession or control of securities, deposits or any other assets belonging to the decedent, is prohibited from making delivery without notice to the State Comptroller and his consent, and for failure to observe the statute, the corporation or person having such possession or control is made liable for the amount of the tax and interest, together with a penalty of not less than $5,000 nor more than $25,000.

In Massachusetts, Section 8 of Chapter 65 of the General Laws of 1921, as amended, contains the usual penalty clause for the transfer of stock belonging to a non-resident, this apparently being the only non-resident transfer tax.

In Illinois, by Section 9 of the Laws of 1909, page 316, no person in possession or control of "securities, deposits or other assets" of a decedent, whether he was a resident or non-resident, may make delivery without notice to the state officers and their consent, subject to a penalty of the tax plus $1,000.

In Ohio, by Section 5531, intangible property is taxed if the succession is for any purposes subject to or governed by the laws of the state, and by Section 5348 no transfer may be made by any corporation or person having possession, custody or control of property belonging to a decedent without official consent, and penalties are prescribed for violation.

In Pennsylvania, by Section 28 of Act No. 258, Laws of 1919, notice is to be given of a non-resident's property, and by Sections 35 and 36, penalties are provided for the transfer of stock without payment of the tax.

In California, by Section 2 of Chapter 821 of the Laws of 1921, as amended, a tax is imposed on any property belonging to a non-resident within the state. By section 13, no domestic corporation shall transfer stock without official consent, no safe deposit or similar company is permitted to rent a box without an agreement that the lessee shall give notice of the death of anyone who has right of access and then no access is to be given after such death, and no one is permitted to deliver "securities, deposits, assets or property" of a decedent, whether resident or non-resident, without such consent. The penalty is the payment of the tax.

It seems to us that the common experience of modern tax departments is a complete answer to any theory that intangible property is substantially more difficult to reach than tangible property and that therefore it is necessary to permit this taxation at the domicile of the decedent.

4. Summary. The attitude of the courts toward changing conditions and growth of the law.

To summarize as briefly as possible what we have necessarily argued at length, it seems obvious that the real test of Connecticut's right to impose a succession tax on the succession to the property involved in these appeals must depend solely on its jurisdiction of that succession. There are two possible arguments on which to base Connecticut's claim: 1. that the law of Connecticut is necessary to the accomplishment of the succession; 2. that the property has a situs in Connecticut and necessarily the succession is controlled by that state by virtue of the situs.

The Connecticut theory of succession taxes rests solely on the first theory. The Connecticut court appears to concede that the property involved has its situs outside the state. It is therefore driven to reliance solely on the theory that the law of Connecticut played a part in the succession.

This theory is overturned by the decision of this court in the *Frick* case. While the *Frick* case dealt with the transfer of tangible property, there is no ground for distinction in the application of this rule between tangibles and intangibles. The application of New York law to the two classes of property is identical; the inability of Connecticut to affect the transfer of either class is identical.

Turning from the authority of the *Frick* case, it is evident as a matter of fact that the transfer takes place entirely under New York law and that Connecticut is powerless either to aid or interfere. The law of administration under which the transfer is actually accomplished is solely the law of New York. New York will not yield its jurisdiction in any respect. The Surrogate was compelled to take jurisdiction of this property under New York statutes, and having taken jurisdiction, as a matter of discretion he will not surrender it nor direct the property to be sent to Connecticut. The New York rule is the ordinary rule throughout the United States. Neither will New York aid Connecticut in the collection of taxes, and the fact that the executors have gone into the Connecticut courts for an entirely different purpose gives Connecticut no jurisdiction to reach the property or the transfer in New York.

The property involved in these appeals is subject to the jurisdiction of New York for the purpose of administration and transfer. The New York court is actually proceeding with the administration and distribution under its own laws, through its own courts. In every real sense the transfer occurs only in New York, and Connecticut has nothing whatever to do with it. Since the tax is on that transfer it is entirely beyond the jurisdiction of Connecticut.

If, however, any reference to the question of the situs of the property is necessary, it is equally evident that

that situs is exclusively in New York. Situs is not physical location. It is jurisdiction and control. The jurisdiction and control of this property is in New York, not in Connecticut. While the old common law rule was that personal property followed the owner to his domicile and had its legal situs there, an actual situs has been given to property, both tangible and intangible, away from the owner's domicile, determined by this test of jurisdiction and control. The fiction of the common law was based on the maxim *mobilia sequuntur personam*. This maxim arose from medieval conditions. It had a basis in fact and in equity at that time. It was always, however, a rule of convenience and comity, subject to abrogation by the sovereign actually controlling the property. More and more it has given way to the fact of actual situs elsewhere, and this is true for the purposes of administration, attachment and execution, as well as property and transfer taxation.

So far as the law of this court is concerned, it is well settled that tangibles have only one situs, and that the actual situs, for tax purposes. The fiction is discarded but it was not discarded all at once. First the fact and the fiction were recognized together. Then the fact was recognized and the fiction discarded as to property taxation alone. Lastly, after forty years, the fiction was entirely discarded and the fact entirely substituted for transfer taxation as well as property taxation.

The growth of the law of situs of intangibles has followed precisely the same development. First there was an experiment to determine the practicability of allocating an actual situs to intangibles away from the domicile. This growth was slow. It has been completed only in recent years. The fact that intangibles have a situs independent of the domicile has now been recognized. It ought now to be established that the actual situs is exclusive.

Intangibles are not different in this respect from tangibles. There is only one piece of property. There is only one place where it can be controlled. To permit two taxes on the same property on the basis of inconsistent fact and fiction is as much a violation of the due process clause as to permit similar double taxation of tangibles. This fact is recognized and declared by many of the state courts and seems at least in one case to have been adopted by this court.

If there are inconsistent principles expressed in earlier decisions they are explicable by the growth of the law. They spring from a rule based on wholly different conditions. The conditions having changed, the law should change with them. It has changed in a material degree already. It ought to be carried to its logical conclusion.

We cannot forbear referring to certain quotations from Judge Cardozo, Chief Judge of the New York Court of Appeals, in his two books, "*The Nature of the Judicial Process*" and "*The Growth of the Law.*" Many of these statements are, in turn, quotations from other authorities. He says that:

> "'Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction'" ("The Nature of the Judicial Process," p. 96).
>
> "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation and frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law" (*Id.*, p. 150).

" 'Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph. The view of the legal system as a closed book was never anything but a purely theoretical dogma of the schools. Jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just' " ("The Growth of the Law," pp. 117-118).

"A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. * * * If abrogation is permissible in cases of extremity, *still more plainly permissible at all times is continuing adaptation to varying conditions.* This is not usurpation. It is not even innovation. *It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past*" (*Id.*, pp. 136-137).

We need not call the attention of this court to the many expressions in its own decisions and by its own judges in harmony with the foregoing quotations.

The doctrine is peculiarly applicable to the present case. Modern conditions have indicated the desirability and the justification for shaking off once more the "dead hand of the common law," in a situation where conditions have so changed that the reason for the original rule has wholly disappeared and its continued application is directly contrary to fact and wholly unjust.

POINT IV.

The attempt of the State of Connecticut to tax the succession to the property involved in these appeals denies full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article IV, Section I of the Constitution of the United States.

So far as our argument under this point is concerned, it depends, of course, on exactly the same facts and considerations as those urged in Point III. We need not repeat here even in summary the review which we made there of the steps taken in New York to effectuate the transfer of the property involved in these appeals, the New York statutes under which these steps were taken, the New York decisions making them effective or the decisions of other states supporting the New York view, all indicating that the transfer took place entirely without any dependence on the law or the courts of Connecticut or any power in them to interfere with it. Neither need we argue at any length that after the New York Surrogates' Court has completed the administration, distributed the property, set up the trusts, discharged the executors, accepted temporary accountings from the trustees or taken other action, the State of Connecticut must recognize the validity of its judgments and decrees, and the executors, trustees, beneficiaries and other parties are fully protected whether in the Connecticut courts or elsewhere as to their acts and responsibilities in relation to such property. We hardly think that opposing counsel will dispute us on this point, but see

Tilt v. *Kelsey*, 207 U. S. 43;
Harris v. *Balk*, 198 U. S. 215;

Chicago, Rock Island etc. Ry. v. *Sturm*, 174 U. S. 710;
Green v. Van Buskirk, 5 Wall. 307; 7 Wall. 139;
Adams v. *Phelps*, 16 Conn. 127, 133;
Parsons v. *Lyman*, 20 N. Y. 103;
In re Clark's Estate, 37 Wash. 671;

and compare the converse situation in

Baker v. *Baker Eccles Co.*, 242 U. S. 394;
McDougald v. *Lilienthal*, 174 Cal. 698.

Now after all in the present case the State of Connecticut, attempting to levy and collect a tax on the transfer of the property involved in these appeals, just as much denies full faith and credit to New York laws and to the action of the New York Surrogates' Court as if the executors, having sold the Liberty bonds and stock under permission of the New York Surrogates' Court, distributed the proceeds to certain legatees, the Connecticut court held their action invalid and attempted to charge them personally with the responsibility for the action. The Connecticut tax is not on the property which was transferred. It is on succession to the property just as the New York tax is on the transfer of the property. But just as the transfer is accomplished, so is the succession enjoyed by reason of New York law and the New York court. The theory of the Connecticut succession tax and of the Connecticut courts in upholding and applying it is that the transfer and succession depend on Connecticut law. Such was the declaration in the opinion in this case (R. 62-66) and

Hopkins' Appeal, 77 Conn. 644;
Warner v. *Corbin*, 91 Conn. 532, 536;
Gallup's Appeal, 76 Conn. 617, 621;
Bridgeport Trust Company's Appeal, 77 Conn. 657.

Those cases recognize that certain of the property involved had its situs outside the state so that the Connecticut tax in no case rests on the theory of situs, but only on the theory of control of the transfer.

That being so, to assess a tax on the theory that the action of the New York courts under New York law was not effective to accomplish the transfer when in fact and in law it was, is obviously to deny full faith and credit in contravention of Article IV, Section 1 of the Federal Constitution.

We do not think it necessary further to amplify this argument. We believe it no less important than the contention urged in Point III based on the due process clause. But the considerations there urged in Sub-point 1, dealing with jurisdiction of the transfer, are those on which our argument here depends, and it seems hardly necessary to reiterate them simply from a different angle.

POINT V.

The decisions of this court deny the right of the petitioner in No. 190 to appeal from the decision of the Connecticut court.

In our brief in opposition to the petition for a writ of certiorari we argued that under the decisions of this court a state or local officer had no right to review the decision of a state court ruling on the constitutionality of a state statute when he sought that review, not by reason of any personal interest in the outcome, but solely by virtue of his official interest. Since the court has before it on the argument of these appeals all the papers heretofore filed, we see no advantage in repeating the argument then made,

but we again call the court's attention to its decisions in the following cases:

Smith v. *Indiana*, 191 U. S. 138;
Braxton County Court v. *West Virginia*, 208 U. S. 192;
Marshall v. *Dye*, 231 U. S. 250;
Stewart v. *Kansas City*, 239 U. S. 14;
Lampasas v. *Bell*, 180 U. S. 276;

and to the general argument which we made in opposition to the petition (pp. 6-8 of the brief in opposition).

CONCLUSION.

In No. 190 the writ of certiorari should be dismissed, or, in the alternative, the judgment of the Connecticut court should be affirmed. In No. 191 the judgment of the Conecticut court should be reversed.

Dated, New York City, February 11, 1928.

Respectfully submitted,

ABRAHAM L. GUTMAN,
KENNETH DAYTON,
Attorneys for the Respondents and Plaintiffs-in-Error.

MAR 19

Supreme Court of the United States

October Term, 1897.

TABLE OF CONTENTS.

PAGE

1. Whether a federal question is involved..... 2
2. The tangibility of the Liberty Bonds. The form of the Tax Commissioner's argument..... 4
3. Jurisdiction to tax the transfer of the intangible property..... 9
4. Double taxation. Public policy. Effect of a decision in our favor..... 12
5. The due process point..... 22

TABLE OF CASES AND STATUTES CITED.

Bullen v. Wisconsin, 240 U. S. 625..... 10

Carpenter v. Pennsylvania, 17 How. 456.....4, 5, 10, 12
Connecticut, Public Acts of, 1923, Chap. 190..... 13
Connecticut, Public Acts of, 1925, Chap. 47..... 13

Eidman v. Martinez, 184 U. S. 578, 581.....7, 12

Foreign-Held Bonds Case, 15 Wall. 300..... 4
Frick v. Pennsylvania, 268 U. S. 473..2, 3, 5, 8, 9, 10, 14, 18

Keeney v. New York, 222 U. S. 525..... 10
Kirtland v. Hotchkiss, 100 U. S. 491..... 16

Lockwood v. Blodgett, 196 Conn. 525..... 2

New Orleans v. Stempel, 175 U. S. 309..... 4

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109.. 3
Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69..... 10

Sherwood's Estate, In re, 122 Wash. 648..... 4

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 .....7, 14

Wachovia Bank & Trust Co. v. Doughton, 272 U. S. 567 10

Zook, In re Estate of, 296 S. W. 788..... 9

Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, Petitioner, against ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc., Plaintiffs-in-Error, against WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.	No. 191

BRIEF FOR RESPONDENTS-PLAINTIFFS-IN-ERROR, IN REPLY TO PETITIONER-DEFENDANT-IN-ERROR, AND IN ANSWER TO PROPOSED BRIEF FOR NEW YORK TAX COMMISSION AND MASSACHUSETTS TAX COMMISSIONER AS AMICI CURIAE.

The brief for the Tax Commissioner of the State of Connecticut presents certain inconsistencies and fallacies

to which this reply is directed. In other respects we think that we have anticipated his arguments in our main brief.

In addition, this brief is directed to the arguments in the brief prepared on behalf of the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, for the filing of which the permission of this court will be sought, counsel for the parties hereto having given their consent to such filing.

1. Whether a federal question is involved.

On the question whether the tangibility of the property involved in No. 190 is solely a matter of state law, the Tax Commissioner confines his argument to two paragraphs on pages 35 and 36. He says rightly that the Connecticut court was not concerned with the interpretation of a Connecticut statute. He ignores the fact, however, that it was concerned with a principle of the Connecticut common law which was as much a matter of local law as the construction of a state statute would be. In the statement that the sole controversy was over the extent of the prohibition of the 14th Amendment, he ignores the fact that, given a decision on the nature of these bonds, the *Frick* case had already answered the federal question. It will be observed that the Connecticut court in its opinion (R. 72-76) carefully classifies all the items of property involved into two lots, tangible and intangible, and places the Liberty Bonds, Treasury Certificates and cash in the first, and the other items in the second class, and then determines the state's right to tax the transfer of the two groups on the principles of the *Frick* case. This classification is emphasized by its subsequent decision in *Lockwood* v. *Blodgett,* 106 Conn. 525, where it holds securities of private corporations and individuals to be intangible under Connecticut law and the transfer thereof accordingly taxable. In other words, despite the Tax Commis-

sioner's denial, the question is precisely in which pigeon hole, "tangible" or "intangible," the Liberty Bonds and Treasury Certificates and cash should be placed. The Tax Commissioner rests his position on the fact that "for eighty years" the State of Connecticut has had the power to tax these bonds. The same statement could be made with equal truth as to a tax on chattels belonging to a resident decedent but located outside the state. It ignores entirely the effect of the *Frick* decision.

It will be noted that the *Red Cross* decision cited by the Tax Commissioner on page 36 in fact favors us. The case turned on the fact that the New York Court of Appeals reached its decision, not as a matter of construction of a state statute or a declaration of state law—*in which event this court would have lacked jurisdiction*—but "because it thought the Federal Constitution required such action." Nothing in the present case indicates that the Connecticut court supposed that the Federal Constitution had any bearing on this decision as to the tangibility of the bonds. The remaining cases cited on page 36 have no application to the present case as long as the Connecticut decision that the bonds were tangible stands.

In the motion on behalf of the New York and Massachusetts tax authorities for leave to file a brief it is stated that the questions at issue in these appeals are not local to the State of Connecticut but bear on the tax policies of every state in the Union. However true that may be of the issues in No. 191, it is not true of the issue of tangibility. The question of tangibility being one of local Connecticut law, it has no effect outside Connecticut and does not obligate the courts of any other state to render a like holding as to the nature of public securities.

Then it is further urged in Point II of their brief that the decision of the Connecticut court on the tangible nature of this property rested, not on the declaration of a rule of Connecticut law, but on a misapplication of federal law and a misunderstanding of California and New York

law. There is no warrant for this argument. The Connecticut court declared Connecticut law (R. 74). It referred to the *Foreign-Held Bonds Case* and *New Orleans* v. *Stempel,* and to California decisions, simply as any court refers to decisions of other courts which it believes to support its own view and which have been persuasive in leading it to reach that view. We disagree with the New York-Massachusetts brief that the Connecticut court did not rightly interpret these decisions, but in any case the decision was clearly an announcement of a Connecticut rule.

We do not see what the law of the State of New York has to do with the case. The question is whether the bonds were tangible property so far as the Connecticut law was concerned. However, counsel seems to have overlooked the New York decisions which we cited on pages 22 and 23 of our main brief.

2. The tangibility of the Liberty Bonds. The form of the Tax Commissioner's argument.

Throughout a large part of his brief, the Tax Commissioner carefully ignores the finding that the Liberty Bonds were tangible and bases his argument on the *assumption* that they are intangible. As a result, there is speciously applied to the Liberty Bonds all of his arguments directed to the intangible property involved in these appeals, without first overturning the Connecticut decision that they were tangible in their nature.

Thus, in his First Point, none of the cases cited which dealt with transfer taxation, except *Sherwood's Estate,* 122 Wash. 648, on page 16, and *Carpenter* v. *Pennsylvania,* 17 How. 456, on page 17, were concerned with public securities, and they have, therefore, no application to the taxation of the Liberty Bonds and cash until the Connecticut finding is upset. Nor are the *Sherwood* and *Car-*

penter cases in point. In the *Sherwood* case there was no claim that the Treasury Certificates involved were tangible, and even had they been held tangible they would have been considered taxable under the old rule, since the *Frick* case had not yet been decided. In the *Carpenter* case it does not appear that the power of Pennsylvania to levy a tax on the public securities was questioned, but objection was made only to the retroactive application of the statute involved.

The whole argument in the First Point is the old one that all of the decedent's personal property passes by the law of the domicile, a principle which is squarely overturned by the *Frick* decision as to tangible property, and hence has no application to the property involved in No. 190 until the Connecticut decision on tangibility is reversed. (Of course, we do not concede the validity of the decisions or the principle as to intangibles; the arguments as to intangibles are refuted in Point III of our main brief and on page 9, *infra*, of this brief.)

Coming to the Second Point, pages 30 to 38 of the Tax Commissioner's brief are devoted to discussion of the Liberty Bonds and cash. His conclusions are again based largely on *assumption* that this property is intangible. So far as argument is directed to the question of tangibility, he says on page 31 that a bond is only evidence of indebtedness, that no amount of dealing or practice can change this, and that recovery can be had without producing the bond. This argument misses the whole point of the Connecticut decision and of our theory. We admit, as the Connecticut court declared, that these securities are, "strictly speaking, mere evidences of debts" (R. 74). But, says the court, such public securities "are treated as a species of *tangible personal property and have come to be recognized as such*" (R. 74). Quoting from decisions of this court, it found that such bonds, because of this course of dealing, have come to be regarded as property

in and of themselves, and that by reason of these considerations they are converted into tangible personal property (R. 75). That is precisely the point of every case cited on this issue in our main brief (pp. 22-23). *Theoretically* such bonds may be evidences of indebtedness but *practically* they are property. The Tax Commissioner's argument that profert is unnecessary offers an excellent illustration of the weakness of the theory as contrasted with the fact. Whatever may be the case with a private bond, he knows perfectly well that no one could hope to collect from the United States Government the value of one of these bonds unless he could produce it—that once the bond is lost or destroyed, it is gone as effectually as a piece of furniture which has been burned.

Then the Tax Commissioner argues on pages 32 and 33 that there is no distinction between public and private securities so far as tangibility is concerned. In determining whether the decision appealed from in No. 190 is sound, we are not concerned if private securities are tangible. Practical considerations in the present day may or may not dictate such a conclusion, but a tendency to find them tangible does not impeach the tangibility of the public securities with which we are concerned. Furthermore, there are substantial considerations which indicate a greater factor of tangibility in the Liberty Bonds. Historically, the attribute of tangibility applied first to public securities and has always been more readily and widely recognized in connection with them. This fact we developed in our main brief at page 23, and it appears from the cases cited just preceding that argument. Practical considerations dictate the same conclusion: a person may recover on a private bond even after it has been lost or destroyed if its validity and ownership can be sufficiently proven, but a recovery on a state or government bond in such a case is practically impossible—and even if the reason for that result is that the debtor is not suable

except by its consent, the result is still that the paper itself is in effect the property and much more than a mere evidence of indebtedness. On pages 25 and 26 the Tax Commissioner has grouped certain states according to their policy in taxing non-residents' securities. It will be noted that the last two groups contain respectively those states which exempt private securities and those which exempt public securities. It will be further noted that while a number of the states listed adopt the same policy as to the two classes, nine states distinguish between them, four exempting private but not public securities, and five exempting public but not private securities. This certainly seems substantial evidence of a distinction between the two classes.

The three reasons stated on page 33 for holding the public security intangible—lack of identity with specific property, the fact that no state can enforce the obligation, and the lack of a local domicile for the debtor—are irrelevant. They confuse control of the debtor and control of the bond itself. If control of the debtor were the test, then the property would be intangible; but it is the fact that the paper is really the property and hence control of the paper is control of the property that forms the basis of tangibility.

Eidman v. *Martinez*, 184 U. S. 578, 581, is cited (p. 35) as a controlling decision of this court, holding that such bonds are intangible. Examination discloses that the case turned on construction of the statute and determination of the Congressional intent, and that the characterization of the property as intangible was simply an introductory descriptive term and had nothing to do with the merits or the decision of the case, nor was it even part of an analytical statement of the law by the court.

Turning on pages 36 and 37 to the cash, the Tax Commissioner does not even deny that it was tangible, but argues that the old rule *mobilia sequuntur personam*

ought to apply to it because it can easily be carried from place to place and secreted. There is nothing in the *Frick* case to indicate that it was confined to chattels. It applies in terms to all tangible property. Its reasoning is equally applicable to all classes of tangibles, and there is nothing to indicate that it turned on inconvenience of transportation or difficulty in hiding the property.

The Tax Commissioner's quotation from the *Union Transit* case on page 32 turns against him. We showed in our main brief (p. 109 *et seq.*) that it was no longer true even as to intangibles that their existence at situs could not be ascertained nor the property reached for taxation, but aside from this it is quite obvious that the argument has no application to bonds or cash, which are just as evident to the senses and no more easily concealed than jewelry, paintings, rare books and similar property.

Some attempt is made on pages 33 and 34 of the Tax Commissioner's brief and in Point II of the brief for New York and Massachusetts to impeach the authorities to which the Connecticut court referred in deciding that the government bonds were tangible in their nature. Neither counsel seems to realize that Connecticut was declaring its own law and simply referred to these cases for their persuasive statement of the considerations which dictated its own decision. The Connecticut court was bound by none of them. Whatever may have been the facts in those cases, the statement of the law and of the practical considerations was apt for the purpose of expressing reasons underlying the Connecticut decision. With the existence of those practical considerations, which opposing counsel do not attack, there is every reason for a court to adopt the rule of tangibility in all aspects of taxation, since a tax system ought to be based on fact and consistent with practical experience and dealings. This argument we have set forth in detail in our main brief (p. 24).

3. Jurisdiction to tax the transfer of the intangible property.

In his first point the Tax Commissioner justifies the Connecticut tax by the old rule that the transfer of all of a decedent's personal property is accomplished by the law of his domicile. This is concededly the theory of the Connecticut tax. We met this issue squarely in the first part of our argument in Point III (pp. 27-59) of our main brief.

That part of his second point which deals with the issues in No. 191, pages 38-47, is partly a repetition of the same theory and partly an attempt to show that Connecticut had jurisdiction to tax the items of property involved as distinguished from the transfer. It is a sufficient answer to this second argument that the tax is on the transfer and not on the property, as the Tax Commissioner himself realizes. This point also is covered by our main brief just referred to.

Turning to specific parts of the argument, the Tax Commissioner cites certain state decisions to support his theory on pages 15-17. It will be observed that all these cases, except *Estate of Zook*, 296 S. W. 778 (p. 16), antedate the *Frick* decision. This court pointed out in the *Frick decision* (268 U. S., at pp. 491 and 493-494) that, so far as reference was made to the domiciliary law, it was by virtue of the law of the state controlling the transfer and was an assertion of jurisdiction by that state. No argument is made and no argument can successfully be made that these statutes asserting jurisdiction over the transfer draw any distinction between tangible and intangible property, or that the domiciliary law is either more or less applicable to the one class of property than the other (see Main Brief, p. 52). Hence the *Frick* decision is a complete answer to these citations. Granted that the *Zook* case is later than the *Frick* decision, it seems plain

that that decision was a misinterpretation of its principles.

On pages 17-20 the Tax Commissioner cites decisions of this court dealing with transfer taxes. We have already distinguished *Carpenter* v. *Pennsylvania* (*supra*, p. 5). In *Keeney* v. *New York* (p. 18) the transfer concededly took place in New York and the only question was whether a tax could be levied on a transfer *inter vivos* but taking effect at death. In the *Rhode Island Hospital Trust Co.* case (p. 19) the language quoted by the Tax Commissioner was unnecessary to the decision of the case, and obviously was general in its application and properly applied to the ordinary case where administration of an estate was had at the domicile.

Bullen v. *Wisconsin* (pp. 18, 19) we distinguished in our main brief (pp. 99-100). That case rested squarely on the old theory that the law of domicile was essential to the accomplishment of the transfer. But we have just shown that the law of the state controlling the transfer makes no distinction in its reference to the law of domicile, whether the property involved is tangible or intangible. The *Frick* case, therefore, has necessarily overturned the principle on which the *Bullen* case was decided.

The Tax Commissioner apparently fails entirely to appreciate the effect of the decision in the *Wachovia Trust Co.* case (p. 20). That decision relies on the principle of the *Frick* case that where the law of the domicile is not involved in accomplishing the transfer, the state of domicile has no jurisdiction to tax the transfer. Dealing as it did with intangible property, it not only reiterates the principles of the *Frick* case, but it answers any contention that those principles were restricted to tangible property. It does away definitely in the case of intangibles with the old theory that the law of domicile was always an essential part of the transfer.

Then, on pages 20-23, the Tax Commissioner cites additional decisions of this court dealing with ad valorem taxation. Those cases are clearly distinguishable because, as we pointed out in our main brief (pp. 87, 91), they all rested on the fact that the tax involved was on the *person* of the owner and reference was made to the property only for the purpose of measuring the tax. Jurisdiction over the property was in no way involved.

Coming on page 23 to the "business situs" cases, the Tax Commissioner refers to the same decisions (p. 86) which we cited in our brief as evidencing one step made by this court along the road to giving an actual situs to intangibles. There is an additional ground of distinction in that they were all property tax cases.

Attempting on page 27 to analyze the nature of the property involved, the Tax Commissioner has fallen into the error of confusing physical location with situs. We need only refer to our analysis of this subject in our main brief, page 62 *et seq.*

Dealing in his second point with the items of property involved in No. 191 (p. 38 *et seq.*), we have already indicated two errors which he makes, first in discussing jurisdiction of the property and not jurisdiction of the transfer, which is the deciding factor, and secondly, confusing situs and physical location. Attempting to rest his contentions on decided authority, his citation of cases dealing with ad valorem taxes is an additional error. We have shown how all those cases are distinguishable, since they depended on jurisdiction of the person and not of the property.

Citing certain cases on the transfer of stock on page 44, he fails to recognize that they turned primarily, not on control of the property as such, but on the assertion of control over the transfer on the old theory. We think it unnecessary to distinguish each of the cases separately. So far as he cites decisions of this court, we have dis-

cussed each of them in our main brief with the exception of *Carpenter* v. *Pennsylvania*, 17 How. 456, and that case we have already distinguished here. As to the state cases, they rest on one of the two principles explained in our main brief, that the law of the domicile controls the transfer or that intangibles have a situs only at the owner's domicile. As to the latter, it may be remembered that this court said in *Eidman* v. *Martinez*, 184 U. S. 578, 589, "*The actual situs of the property in such cases* (succession taxation) *cuts but a small figure* * * *."

4. Double taxation. Public policy. Effect of a decision in our favor.

These questions are presented in two aspects in the briefs of our opponents, the one relating to the tax on this particular estate, and the other the broader question of its effect on taxation and tax policies generally.

To dispose of the narrower question first, the Tax Commissioner suggests throughout his brief that the executors are seeking to escape their just share of the burdens of government, that the New York tax is only minor in amount and that the real problem of the case is not one of "double taxation" but of "escape from taxation" (pp. 7, 38, 43). Answer can briefly be made as follows:

1. In fact only a comparatively small amount of the property involved escapes the New York tax law. The partnership interest and the stock in New York corporations, both taxable under the New York law, were valued at $1,938,341.56, or approximately 80% of the total estate (R. 17).

2. The estate paid the State of New York only $19,166.04 as a tax (R. 18), not because the property as such is exempt, but because the bulk of the estate passed to public, charitable and educational uses.

3. The Connecticut Tax Commissioner can hardly criticize such a policy. Except for the accident of the testator's death during the two years when Chapter 190 of the Laws of 1923 was effective, these gifts for public purposes would have escaped taxation by Connecticut too. Under that law, only gifts to charitable corporations in Connecticut were exempted, but this was contrary to the public policy of Connecticut and the general exemption of all charitable gifts, no matter where the beneficiaries were located, was restored in 1925 (Public Acts of Conn., 1925, Chap. 47).

All taxes levied are by the terms of the will to be paid out of the residuary charitable gift (R. 14, par. 18 of Will).

Turning to the more general phase of this question, the Tax Commissioner has discussed it briefly at page 26. It is the main point, however, of the brief for New York and Massachusetts authorities, and they have drawn a very elaborate picture of the evils of double taxation, the remedy which they advocate of reciprocal statutes permitting the domicile only to levy such a tax, and the results which they believe will follow if our theory is accepted by the court.

We are indebted to the brief of *amici curiae* for their description of the results which have followed from double taxation (which, in fact, of course, has been triple and quadruple at times). No one could paint a darker picture of the results than does their own statement of the situation and their quotation from the report of the committee appointed to study the subject (pp. 8-21). They dispose conclusively of the rather bold suggestion made by the Connecticut Tax Commissioner that the legislative tendency today is away from double taxation.

The object of the committee's study was to do away with the evils of double taxation. To attain this result it urged that in principle intangible property should be taxed only by the state of domicile and that the various states ought to adopt reciprocal statutes exempting non-residents of those states which give a like exemption (pp. 19-20). Of course, such a system, to be effective, must be adopted by substantially all of the states, and having been adopted it is still subject to the weakness that any state can change its mind. On the other hand, if the principles which we urge are recognized, their application becomes universal immediately, without danger of change.

There seem to us substantial additional weaknesses in the reciprocal system. In the first place, experience in the past does not indicate any great willingness on the part of legislatures to forego convenient sources of taxation, whether they are justified in principle or not. The exemption of tangible personalty from direct property taxation came not from legislative action, but as the result of the decision of this court in the *Union Refrigerator* case. The exemption of tangibles from transfer taxation was not due to legislative concurrence in the principle, but to the *Frick* decision. Examples could be multiplied. We see little reason to hope for the conversion of legislatures to the principle of a single tax on intangibles under these reciprocal statutes. We think the only prospect of such a result is a decision of this court enunciating sound principles. Certainly the experience with uniform state laws which have been advocated for a considerable number of subjects over a long period of years is not encouraging. Despite the fact that most of these branches of the law are wholly non-controversial, uniform laws have been adopted only by a minority of the states. How much hope can there be of uniform legislation where the selfish interest of the states is concerned as it is in taxation?

It is urged by the New York-Massachusetts brief that 21 states now adopt the reciprocal principle (p. 22). Examination discloses that only 11 states have adopted the reciprocal provision, and in one of these—New York—the statute has been held unconstitutional. The remaining states either do not at present impose transfer taxes, or they do not tax intangibles of non-residents whether there is reciprocity or not. No one can say how long the policy which dictates this freedom from taxation will continue. It is based on an unsound theory—it gives a return to the state of domicile because that state traditionally has been permitted to collect such a tax, and denies it to the state extending actual protection and control over the transfer, although the fact of this protection and control has just begun to be recognized. As problems of taxation become more pressing, we question whether this solution of the problem will be welcomed by the majority of taxpayers. They are more likely to say that those who benefit by the laws of their states, though non-resident, should bear a just share of that burden, and that those among their residents who benefit from the laws of other states may well pay their share of the expenses of the other state. Under the reciprocal systems, all those who do not benefit are subjected to additional burdens.

The fundamental error in the proposed plan is shown in the report of the committee quoted in the brief. The committee said: "Intangible personal property according to its very nature, has no definite physical *situs* of its own, but the time-honored maxim of the common law that '*mobilia sequuntur personam*,' or 'moveables follow the person,' has given it *an artificial situs* at the domicile of the owner which has long been respected. * * * But the claims of the several states as to the location of intangible property have led to *the anomaly of more than one situs for the same item of property.*" The real anomaly, we should say, would be to return to a system which con-

cededly is based on an artificial situs and a disregard of actuality and fact.

Since the evils of double taxation may be corrected without awaiting legislative conversion or depending on the continuance of that conversion, by a determination that a transfer of intangible propery having an actual situs is taxable there only, and since a system based on that determination has the advantage that it is in accord with the fact, what practical objections can be made to it?

It is said in answer that a decision in our favor will enable estates to escape taxation entirely, will result in the substantial breakdown of the tax systems of the states, and has against it every consideration of history and policy. Without repeating the analysis made (pp. 23-26), the picture drawn is a very dark one. It is all the darker because it is insisted that such a decision on transfer taxation will necessarily invalidate general property taxes directed to intangibles (pp. 3, 29).

At the outset, we may well dispose of the contention that a decision in our favor will disrupt the tax systems of the states because it necessarily invalidates any tax intended to reach intangibles similarly situated during the owner's lifetime. It will do nothing of the kind. It is true that if these intangibles are located beyond the jurisdiction of the state of domicile they cannot be reached by direct taxation, but this court has held repeatedly that a personal tax can be levied on the owner measured by the total value of his personal property wherever situated (cases cited, Main Brief, p. 91, and also *Kirtland* v. *Hotchkiss,* 100 U. S. 491). A decision here is certainly no reversal of those cases. The test in transfer tax cases is jurisdiction of the transfer. The test in personal tax cases is jurisdiction of the person. And indeed a decision here on jurisdiction of the transfer is not even a decision on the situs of, and consequent jurisdiction to tax, the

property itself, so that the question even of direct property taxation is still open.

There is, therefore, removed from the analysis at the outset the spectre of total disruption of existing tax systems. We think the picture sketched of the effect on transfer taxation is equally overdrawn.

We suppose our opponents will agree with us on two elementary propositions: first, that the exemption of property from taxation by a state which has jurisdiction to levy a tax creates no right to levy a tax in a state which otherwise would lack jurisdiction; and secondly, that an objection based on the due process clause of the Constitution is not answered by pleas of inconvenience or loss of revenue.

Perhaps we may call the court's attention here to the relative importance of transfer and other taxes in the revenue systems of the states. The brief for New York and Massachusetts having just been served upon us, we have not had the opportunity to secure statistics to show how comparatively small a part of the revenue of our states is realized from death taxes, but we think our opponents will hardly challenge the statement that they occupy a relatively unimportant place. Even if it were true that transfer taxation were entirely done away with, it would not follow that a major part of the state revenue had to be replaced from some new source.

Counsel for both Connecticut and New York and Massachusetts urge—the latter in much greater detail—that wholesale evasions of transfer taxation would result, and, indeed, suggest that transfer taxes would have to be done away with, and urge the inequity of such a result to the states. The basis of their contention is the assumption that certain states would levy no transfer tax on such intangibles and would thereby encourage the residents of other states to locate their intangible property within the borders of the non-taxing states.

It is unfair and misleading to apply the term "evasion" to a proper investment in a state other than that of the investor's domicile. We should suppose that as a matter of course, if the location of property away from the owner's domicile were made for the purpose of tax evasion in the strict sense—in other words, if there was no *bona fide* purpose—the principles which we urge would not protect the taxpayer. The burden might well be placed on the taxpayer to show that the location of his property away from domicile was made in good faith and not for the purpose of evading taxation, just as the burden now rests on him in most states to show that a transfer made within a certain time before the decedent's death was not made in contemplation of death. Deliberate evasion never gives a basis of constitutional right, but the possibility of evasion is no reason for denying constitutional rights to parties who act in good faith.

A man has always been able to escape taxation by the state of his domicile on such part of his wealth as he chose to invest in real property located in a state which did not levy a transfer tax. The wealthy investor in real estate who chooses to put $5,000,000 in a real estate development in Florida is free from any transfer tax on that amount at his death. We do not know that the inequity of such a result has ever appalled anyone. In fact, it has been accepted as quite a normal result.

If we are not mistaken, when the *Frick* case was pending before this court other states than Pennsylvania were concerned with the prospective result of a decision in that case on much the same grounds. It so happened that Mr. Frick's art collection and his extensive personal property were located in two states which levied transfer taxes on them—although in New York they escaped because of the benevolent gift—but under the principle of the *Frick* case a man in his position might choose Washington instead of New York for the center of his art collection, and might

elect to have his country estate in Florida instead of Massachusetts, and his tangible personal property would thereby be freed from any burden of transfer taxation. This result was perfectly obvious when the *Frick* case was decided. Yet it presented no bar to the declaration of sound rules of law.

Why is a man who invests his wealth in intangible property outside the jurisdiction of his domicile in a different position? Why is he the more obligated to pay taxes on that investment than on an investment in tangibles outside the state? If a resident of New York owns outright a manufacturing business in Pennsylvania he is concededly not liable to a tax on the transfer of the buildings and machinery at his death. Why should he become liable by reason of incorporating the company so that his ownership is represented by stock? What greater obligation does he owe to the state of his domicile in the one case than in the other?

In one aspect it would be to an owner's interest to locate his intangibles in a state which levies no inheritance tax, but in practice we should probably have precisely the situation which now exists where considerations of business convenience and expediency are balanced against the burden of taxation. For example, until 1926 stock in a New Jersey corporation owned by a non-resident was subjected to a very heavy transfer tax by that state. Yet it is common knowledge that many of the greatest aggregations of capital in the country were incorporated there, and so subjected their stockholders to that taxation, although they could have sought incorporation in Delaware and avoided the burden. The real result—and we think it a very beneficial one—will be to make the states give some thought to the rates of their inheritance taxes. If they insist on following the policy which has been in vogue in some of the states recently, and in the guise of inheritance

taxation confiscate a material part of the capital of their wealthy citizens, they will undoubtedly find themselves driving that wealth outside their borders. If, on the other hand, they adopt a policy of reason and moderation, very few business men will give up the convenience and efficiency of having their property at hand and subject to their control, to save a moderate and reasonable tax payable only in the event of death. The situation instanced in New York is an excellent illustration. Here we have the most active market for securities in the country and the money center of the world. Business cannot afford to divert its intangible capital from New York. It may indeed be driven from New York by grasping taxation, but this taxation must be so high as to rest an unconscionable burden on the commerce of the country, and if the state follows that policy it deserves to lose both its revenue and its importance as a money center.

Neither is it the fact that if death taxation were limited there has been destroyed any source of taxation. After all, any tax ultimately rests on underlying physical property. All that is accomplished by death taxes on intangible property is to make taxation slightly more palatable by dividing it into two parts, one a direct tax on the underlying property, and one a transfer tax on the securities representing that property. If a resident owns the bonds of a domestic corporation, it is obvious that in the price paid for the bonds or the return received from them the element of prospective transfer taxation is considered. If freedom from taxation of the transfer of those bonds is assured, the cost of the loan to the corporation is reduced by so much and an equal increase in the direct tax on the corporate property will have laid no additional burden on it. As a matter of fact, the total burden on the potential taxpayers may be substantially less, because where two taxes are collected there must be included a double overhead for collection and the taxpayer must also figure on the cost of two tax returns to him. The brief for *amici*

curiae has pointed out (pp. 13-18) the unconscionable cost of transfer tax returns to the taxpayer. The drawback from the view of the tax authorities of a given state to this scheme is that a single direct tax on property looks much larger and causes much more protest than two taxes on two different forms of the property, even though the single tax be smaller than the aggregate of the two. But it does not follow that the result is undesirable. The mounting cost of municipal and state government has been facilitated by the ability of tax officials to diversify the form of the various levies so that no one burden seems unbearable.

Similarly, suppose a man does form a holding corporation in a state where no transfer taxes are levied, to take over the stock of a corporation organized in a state which does levy such taxes. We have precisely the same situation as that just described. The stock may escape taxation; the underlying property of the corporation is still available and the stockholder is compensated for an increased tax on that underlying property by his freedom from a transfer tax. Again, of course, the tax authorities must use a little discretion as to the amount of the direct property tax.

In conclusion, we call attention to another error which the Tax Commissioner makes in his brief. He lists 35 states which exempt foreign corporate stock belonging to non-residents from transfer taxation though the certificates are in the state at the time of death (p. 25). He has failed to observe that these certificates are subject to *double* taxation, by the state of domicile and by the state of incorporation, and that all these statutes do is to free them from *triple* taxation.

5. The due process point.

We think the argument in our main brief, Point IV, pages 118-120, fully covers the Tax Commissioner's Third Point (p. 48), dealing with the question of full faith and credit. The decisions which he cites on page 49 are either distinguishable or consistent with our argument.

Dated, New York City, March 9, 1928.

Respectfully submitted,

ABRAHAM L. GUTMAN,
KENNETH DAYTON,
Attorneys for Respondents
and Plaintiffs-in-Error.

FILED
MAR 12 192
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,
vs.
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors,
on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.

No. 190

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc.,
Plaintiffs-in-Error,
vs.
WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.

No. 191

BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AND THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICI CURIAE.

SETH T. COLE, ESQ.,
Counsel for Amici Curiæ.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS

PAGE

Statement of scope of brief..... 1

Point I—There are no considerations of economy or public policy which should persuade the court to discard the *mobilia sequuntur personam* maxim and change its former decisions holding that the state of domicile of a decedent may subject all of his intangible personal property to death taxes... 4

Point II—United States bonds and treasury certificates are not tangible personal property and may be subjected to a death tax at the domicile of the owner.. 30

Table of Cases, Etc.

American Bankers Association Journal, v. 17, pp. 118-9, August, 1924..... 9

Annalist, v. 25, p. 223, February 9, 1925..... 9

Atlantic, v. 133, pp. 290-7, March, 1924..... 8

Blackstone v. Miller, 188 U. S. 189..... 26

Buck v. Beach, 206 U. S. 392..... 32

Chambers v. Mumford, 187 Cal. 228..... 33

Colorado v. Harbeck, 232 N. Y. 71..... 28

Crosby v. Town of Charlestown, 78 N. H. 39..... 32

Economic World, n. s., v. 26, pp. 53-4, July 14, 1923.... 9

v. 27, pp. 305-6, March 1, 1924 9

v. 29, p. 233, February 14, 1925 9

Frick v. Pennsylvania, 268 U. S. 473.....3–30–33

Laws of New York, 1920, Chap. 647..... 34

1925, Chap. 143..... 21

Literary Digest, v. 84, p. 11, March 7, 1925..... 9

Matter of Estate of Fair, 128 Cal. 607..... 32

PAGE

Matter of Estate of Hodges, 170 Cal. 492..... 33
Matter of Estate of McCahill, 174 Cal. 482..... 33
National Income Tax Magazine, v. 2, pp. 133-4, May, 1924 9
New York Trust Company v. Eisner, 256 U. S. 345.... 27
People v. Home Insurance Co., 29 Cal. 533..... 32
People *ex rel.* Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48..... 33
Princeton, 1924 9
Proceedings Conference on Inheritance and Estate Taxation printed as appendix to the Proceedings of 17th Annual Conference on Taxation under the auspices of National Tax Association, 1924..... 10
17th Annual Conference on Taxation under the auspices of National Tax Association, 1924, pp. 446-7 10
National Conference on Inheritance and Estate Taxation, February 19-20, 1925.....10–11
Report of National Committee on Inheritance Taxation to National Conference on Estate and Inheritance Taxation held November 10, 1925, pp. 40- 7....11 to 19
pp. 48-50....19 to 21
Saturday Evening Post, v. 196, pp. 14-5, February 16, 1924 8
pp. 14-5, March 8, 1924 9
v. 197, p. 25, January 3, 1925 9
v. 198, p. 23, July 4, 1925 9
Smith v. Loughman, 245 N. Y. 486..... 22
Southern Pacific Co. v. Kentucky, 222 U. S. 63..... 27
State Tax on Foreign-held Bonds case, 15 Wall. 300... 30
Trust Companies, v. 36, pp. 749-51, June, 1923..... 9
v. 37, pp. 379-81, October, 1923 9
Westinghouse Co. v. Los Angeles, 188 Cal. 491..... 32
Wheeler v. Sohmer, 233 U. S. 434..... 32

IN THE

Supreme Court of the United States

OF AMERICA.

October Term, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, *Petitioner*, vs. ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc., *Plaintiffs-in-Error*, vs. WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.	No. 191

BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AND THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICI CURIAE.

Statement.

Two questions before the court are to be discussed in this brief, viz.:

(1) May the State of Connecticut in which the decedent, Robert B. Hirsch, was domiciled at the time of his death, impose its inheritance tax upon certain intangible personal property owned by the decedent at the time of his death consisting of the following items:

(a) An interest as a general partner in a limited partnership organized under the laws of the State of New York and having its principal place of business in the City of New York, the surviving members of the partnership being residents of the State of New York;

(b) United States Liberty Bonds which were physically within the State of New York;

(c) United States treasury certificates which were physically within the State of New York;

(d) Shares of stock of corporations organized under the laws of states other than Connecticut, including New York corporations, and of Canada, the certificates of which were physically within the State of New York;

(e) A deposit in a savings bank of the State of New York;

(f) The proceeds of an insurance policy on the life of the decedent issued by a New York insurance company, the policy being physically within the State of New York and the proceeds being payable to the executors;

(g) Coins and bank notes physically within the State of New York;

(h) Bonds of Connecticut corporations physically within the State of New York?

The will of the decedent was first admitted to probate in the State of New York and was thereafter probated in the State of Connecticut and letters testamentary were

granted to the executors in both states. The executors are all non-residents of the State of Connecticut.

(2) Assuming that the answer to the first question is in the affirmative, are the United States bonds and treasury certificates described in (b) and (c) above to be considered tangible personal property having an actual *situs* without the State of Connecticut and for that reason not subject to an inheritance tax in said state under the doctrine of *Frick vs. Pennsylvania,* 268 U. S. 473?

The first question constitutes the major issue and the second question the minor issue. If the major question be answered in the negative it becomes unnecessary to consider the minor question but if the major question be answered affirmatively, the minor question must also be answered.

A negative answer to either question will produce the utmost confusion in the administration of the death tax laws of the various states. Should the major question be answered in the negative, it is believed the result would be not only to make it practically impossible for any state to impose a death tax on other than tangible property, regardless of the domicile of the decedent, but, furthermore, such a decision would of necessity seem to require a reversal of the rule that a general property tax may be imposed by the state of domicile of a person upon intangible personal property owned by him.

It is, therefore, not an exaggeration to state that these questions are the most important the court has ever been called upon to consider so far as they relate to the right of the states to impose death taxes.

ARGUMENT.

POINT I.

There are no considerations of economy or public policy which should persuade the court to discard the mobilia sequuntur personam maxim and change its former decisions holding that the state of domicile of a decedent may subject all of his intangible personal property to death taxes.

For the purpose of the argument under this point, it will be assumed but, of course, not conceded, that the executors are right in their contention that administration of the intangible personal property of this decedent, other than shares of stock in Connecticut corporations and the debt due from a resident of Connecticut, may be had in Surrogates' Court of the County of New York, State of New York, and that such property may be distributed pursuant to the authority and under the jurisdiction of that court without regard to the Probate Court for the District of Stamford, State of Connecticut, and without regard to the laws of the State of Connecticut except insofar as the laws of that state may be adopted by the State of New York on grounds of comity for the purpose of effecting distribution. In other words, it will be assumed that the right of Connecticut to levy a death tax upon said intangible personal property is based solely upon the fact that the decedent was domiciled in that state at the time of his death.

Counsel will refrain from a discussion of the cases decided by this court which hold that the state of domicile of a decedent may tax his intangible personal property on the *mobilia sequuntur personam* theory, inasmuch as these

cases are cited and discussed in the able brief of counsel for the petitioner and defendant-in-error. Said brief establishes that it is now the rule of this court that the state of domicile of a decedent may exact a death tax upon all intangible personal property owned by him at the time of his death, regardless of the nature of the property, the residence of the debtor, the place where evidences of indebtedness may be kept, the jurisdiction of incorporation of companies in which the decedent was a shareholder or the physical location of the share certificates.

We are, therefore, confronted with a situation which requires that this court adhere to its former decisions and answer at least the major question in the affirmative, or else that it discredit the *mobilia sequuntur personam* maxim in its application to death taxation of intangible personalty and lay down a new rule of law taking away from the state of domicile the right to tax intangible personalty which may be so situated that it may be subject to administration and distribution under the laws of another jurisdiction.

Let us then consider the reasons which should influence the court in reaching a conclusion, looking at the questions from the broad standpoint of economy and public policy. In doing this, the argument under this point will be directed toward the development of a background for the legal picture that will be exhibited to the court by the briefs of counsel for the parties to the issue.

It is respectfully submitted that death taxes have their proper place in any system of taxation and that it should be possible to reach all property owned by a person at the time of his death in order to lay a death tax thereon. Under the existing law, this may be done by the states but

will be impossible if the executors are successful in their argument. Death taxation is one of the oldest forms of raising public revenues and death taxes are imposed by most sovereignties throughout the civilized world. In the United States, the federal government and forty-five of the forty-eight states levy death taxes, as do the territories of the United States and certain of its possessions.

What reason is there, if any, why the state of domicile of a decedent should be denied the right to tax any portion of his intangible personal property? Undoubtedly, the principal argument to be advanced against such right is that under certain conditions other states may also levy a death tax, resulting in double or multiple taxation. At first glance, this may seem to be a compelling reason, but upon more careful examination, it will be seen that the argument does not carry a great deal of force. To begin with, if the state of domicile is denied the right to tax, it does not follow that double or multiple taxation will be avoided. The federal estate tax insures a double tax in every estate the value of which exceeds the exemption allowed by the Revenue Act. The shares of stock owned by this decedent in corporations organized under the laws of the State of New Jersey might have been subjected to a tax in New Jersey where the shares have a *situs*, and another state might tax if the shares happened to constitute capital employed in business there. Indeed, some states have asserted the right to levy a tax upon corporate shares merely because the corporation maintains a transfer office within their borders, although the corporation may be foreign and the decedent a non-resident.

Notes and bonds of corporations (including states and municipalities) and individuals may be taxed where the

same are physically located at the time of the owner's death, although not located within the state of domicile, and may also be taxed by another state as capital invested in business by the decedent. Sometimes corporate notes and bonds are additionally subjected to tax by the state of domicile of the corporation, particularly if they are in registered form.

Still another example of multiple taxation would be in the case of the shares of a corporation incorporated in more than one state. A California decedent who died owning shares of stock in the New York Central Railroad Company, even if not subject to tax thereon in California, would still be subject to the taxes of the six states in which the railroad company is incorporated and might also be taxable in other states as indicated above.

A co-partnership interest might be taxed in several states because of the business being conducted in each of said states, and none of these the state of domicile of the decedent.

Clearly, denial of the right of the state of domicile to tax intangible personalty according to the *mobilia sequuntur personam* theory would not eliminate multiple taxes, and other good grounds for the denial of such right from the standpoint of economy and public policy seems lacking.

It remains to consider the reasons why the right of taxation of all of a decedent's intangible personal property by the state of domicile should be retained. In discussing this feature of the case, it becomes necessary to review the history of events which have transpired in the past four or five years and which were designed to correct many of the

evils which had sprung up in connection with death tax laws, and especially the multiple tax evil.

In the year 1924 the people of the United States had become thoroughly aroused over the inequities of death taxation. This was the culmination of a storm which had been brewing for many years. Property included in estates was being subjected to death taxation by many jurisdictions; in fact, by almost every jurisdiction which could find any pretext on which to base the claim of a right to impose a tax. Multiple death taxation was not only evil of itself, but other evils followed in its train. Proceedings to have the tax assessed were required in many jurisdictions, resulting in expense and delay. Some states seemed to consider the non-resident estate to be legitimate prey and enacted laws which made it essential that local counsel should be employed in death tax proceedings. In any event, it was necessary to file returns with each state which imposed a tax and these returns were wholly lacking in uniformity, as were the taxing laws of the states. Most states which asserted a tax refused to permit the transfer of the property until returns had been made and the tax ascertained and paid. This often resulted in substantial losses because it prevented the prompt sale of securities in a favorable market. Articles appeared in many of the national magazines condemning the prevailing practices and the newspapers took up the subject seriously.

See

Atlantic, v. 133, pp. 290-7, March, 1924.

Princeton, 1924.

Saturday Evening Post, v. 196, pp. 14-15, Feb. 16, 1924.

pp. 14-15, March 8, 1924.
v. 197, p. 25, January 3, 1925.
v. 198, p. 23, July 4, 1925.
Economic World, n.s., v. 26, pp. 53-4, July 14, 1923.
v. 27, pp. 305-6, March 1, 1924.
v. 29, p. 233, February 14, 1925.
Trust Companies, v. 36, pp. 749-51, June, 1923
v. 37, pp. 379-81, October, 1923.
American Bankers Association Journal, v. 17, pp. 118-9, August, 1924.
Literary Digest, v. 84, p. 11, March 7, 1925.
National Income Tax Magazine, v. 2, pp. 133-4, May, 1924.
Annalist, v. 25, p. 223, February 9, 1925.

The foregoing citations are taken somewhat at random; they could be greatly increased.

Quite logically, the agitation led to a consideration of remedies. The President of the National Tax Association issued a call for a conference to be held at St. Louis in September, 1924, to which the governors of the states sent delegates. The subject was analyzed and discussed at this conference, and at the conference under the auspices of the National Tax Association held at the same time, and resulted in the adoption by the latter conference of a resolution requesting the National Tax Association to endeavor to bring about a conference of representatives of the state and federal governments to further consider the matter and to seek a remedy. The resolution read in part:

> "In the opinion of this conference, the time has arrived for the several states to take counsel among themselves and with the Federal Government, with respect to the problems of inheritance and estate taxation, to the end that existing evils may be corrected."

(See proceedings of Conference on Inheritance and Estate Taxation printed as appendix to the proceedings of the 17th annual Conference on Taxation under the auspices of the National Tax Association; also proceedings of the latter conference, pp. 446-7.)

The conference suggested by the resolution was held at Washington, D. C., on February 19-20, 1925, and was attended by delegates appointed by the governors of twenty-five states. Delegates were also present representing the District of Columbia. Eight other states were represented by unofficial delegates. The government of the United States was represented by the Secretary of the Treasury and by President Coolidge, who addressed the conference. (See Proceedings of the Conference.)

President Coolidge said in part:

"There is competition between states to reach in inheritance taxes not only the property of its own citizens, but the property of the citizens of other states which by any construction can be brought within the grasp of the taxgatherer. A share of stock represents a most conspicuous example of multiple inheritance taxation. It is possible that the same share of stock, upon the death of its owner, may be subject to taxation, first, by the Federal Government; then by the state where its owner was domiciled; then by some other state which may also claim him as a citizen; again in the state where the certificate of stock was kept; in the state where the certificate of stock must be transferred on the corporation's books; in the state or states where is organized the corporation whose capital stock is involved; and, finally, in the state or states where this corporation owns property. All this means not only an actual amount of tax which may under particular circumstances exceed 100 per cent of the value of the stock, but the expense, delay and inconvenience of getting clearances of the states who claim a right to tax the property is a serious burden to the heir who is to

receive the stock. Particularly is this expense disproportionate to a tax paid by a small estate which has but a few shares of stock. In many cases the expense alone must exceed the total value of the shares which it is sought to transfer. Looking at it from the standpoint of state revenue, I am told it is probable that the full cost to executors of ascertaining the tax and obtaining the necessary transfers is in the aggregate nearly as much as the tax received by the states upon this property of non-resident decedents. Here, indeed, is extravagance in taxation.

"A solution of this problem presents the difficulty of obtaining reciprocal action on the part of the states. I feel, however, that in fairness to each other and to their taxpayers, some way will be found of obviating this extravagance, by giving up entirely the collection of taxes upon personal property of non-resident decedents, or by the imposition upon the transfer of such property of a tax extremely simple in administration and low in amount." (Proceedings, pp. 8-9.)

The conference adopted a resolution for the appointment of a committee to review the death tax situation and to call a second national conference for the purpose of submitting its report. The committee appointed pursuant to said resolution consisted of three representative business men, three economists and three tax administrators, and was so selected as to give representation to each part of the United States. The committee submitted its report to the Second National Conference on Estate and Inheritance Taxation, held at New Orleans, Louisiana, on November 10, 1925. Extracts from the report of said committee dealing with the problem now under discussion follow:

"Multiple Taxation of the Same Property by States Should be Abandoned. Conflicting view of the *situs* of property for taxation have led to abuses by the states which have become almost insufferable. In the early days of the inheritance tax a state was content to tax the real property located within its borders and the personal property of decedents who were resi-

dents of the state at the time of death. Within the last few years, however, most of the states, in addition to taxing all of the personal property of its resident decedents, have adopted laws whereby intangible personal property belonging to non-resident decedents is regarded as having a *situs* for the purposes of taxation within the state under certain circumstances. By thus establishing more than one tax *situs*, such laws have necessarily brought about duplicate and multiple taxation of the same property.

"The *situs* of real estate for the purpose of taxation has always been regarded as fixed under the law and it is well settled by the Supreme Court of the United States that it can be taxed only where it is physically located. Therefore, no attempt has been made by any state to tax real estate located beyond its borders, with the exception of two or three states, which by a construction of the doctrine of equitable conversion have attempted to tax such property under some circumstances. Elsewhere real estate, therefore, does not suffer the injustice of being taxed by more than one state.

"Whatever doubt may have existed with reference to the taxation of tangible personal property was definitely settled by the Supreme Court of the United States in an opinion announced on June 1, 1925, in the cases of Frick vs. The Commonwealth of Pennsylvania. The court held that the only *situs* for the taxation of tangible personal property was the state in which it is physically located and that the state of domicile has no power to tax tangible personal property located beyond its borders. This decision, therefore, eliminates the possibility of taxation of such property by more than one state in the future.

"Intangible personal property according to its very nature, has no definite physical *situs* of its own, but the time honored maxim of the common law '*mobilia sequuntur personam,*' or 'movables follow the person' has given it an artificial *situs* at the domicile of the owner which has long been respected. Every state, therefore, which has an inheritance tax law undertakes to tax all of the intangible property of its resident decedents. The great majority of them, however, in addition undertake to impose a tax on intangible prop-

erty belonging to non-resident decedents when such property is located in the state. But the claims of the several states as to the location of intangible property have led to the anomaly of more than one *situs* for the same item of property. For example, thirty-six states impose a tax upon the stock of corporations chartered by them although the stock is owned by a non-resident decedent. Eleven states attempt to impose a tax upon the transfer of stock owned by a non-resident decedent if the corporation has property within its borders even though it be incorporated in another state. This provision has been declared unconstitutional by the highest court in several of the states. The Supreme Court of North Carolina, however, upheld the tax in a case which is now pending in the United States Supreme Court. Sixteen states attempt to tax the stock owned by a non-resident decedent even though the corporation be a foreign corporation, if the certificate of stock happens to be physically located in the state at the time of death.

"If, therefore, a resident of Wisconsin should die owning stock of a New Jersey corporation and the certificate of stock happened to be deposited in a safety deposit vault in Missouri, and the corporation owned property in North Carolina, before the property could be transferred by the executor it would be necessary for him to pay inheritance taxes on the stock to the State of Wisconsin, the State of New Jersey, the State of Missouri and the State of North Carolina. In addition, if the estate is over $50,000, he must pay a tax to the Federal Government. If the stock happened to be that of a company also incorporated in states other than those enumerated, such other states would have to be added to the list. Some railroads are incorporated in five or six states, and the shares of stock are taxable in each upon the death of the owner. The situation as to bonds, notes and other obligations is equally deplorable, as will appear from the accompanying chart showing the personal property of non-resident decedents subject to tax in the various states.

"Theoretically, at least, these taxes might amount to more than 100 per cent, and actually the multiple burdens do work great hardships upon estates. Information collected by this committee shows that these

burdens are not limited to large estates. A resident of New Jersey whose gross estate was only $49,000 was recently required to pay an aggregate tax of $7,112.56, or 15 per cent of the gross estate to three states. A gross estate of $8,458.10 in Kentucky was required to pay inheritance taxes aggregating $634.75, or approximately 8 per cent to three states. An estate of only $2,000 in Arkansas was required to pay a tax of approximately $50 to another state.

"In fact, it is very probable that small and moderate estates suffer far more in proportion from these conditions than the large estates. The owners of large estates usually employ competent advisors, and by various devices, such, for example, as shifting investments or organizing holding corporations, escape the burdens to a considerable extent. The owners of small and moderate estates, on the other hand, seldom realize the need of expert advice in such matters, and their estates are frequently called upon to pay taxes which could have been avoided by a manipulation of investments prior to death.

"Moreover, these conditions penalize such a diversification of investments as might be sought either for the promotion of safety or for increasing the productiveness of capital. In this regard also the small or moderate estate is apt to suffer more in proportion to size than does the large estate.

"Excessive taxes, however, are not the only burden growing out of the multiple claims in regard to the *situs* of property. The inconvenience, delay and economic waste in the settlement of estates, which necessarily result, are often more oppressive than the taxes imposed. In order to determine whether taxes are chargeable, the laws of each state require the executor to secure a waiver before transferring any property coming within the provisions of its laws. To secure these waivers it becomes necessary for the executor to prepare the necessary forms and such other papers as the law of the particular state may require. The preparation of such papers involves expense even though frequently, because of the exemptions and deductions allowed, no taxes whatever are payable. These forms are by no means similar in the various states, and it is often necessary to prepare a number of different sets for a single estate.

"For one estate in New York formal requirements in the nature of inheritance-tax proceedings were required in twenty-two states and one foreign government, although prior to the decedent's death his attorneys and bankers had examined his securities and made many sales for the express purpose of avoiding multiple proceedings. Had this precaution not been taken, proceedings would have been necessary in nearly forty states. For a recent Pennsylvania estate such proceedings were necessary in twenty-two different states, the Province of Ontario and the Federal Government. Numerous instances have been found by the committee which show such proceedings in from ten to twenty states. In fact, records of the trust companies indicate that for settling the average estate such proceedings are required in no less than six or eight states. Nor is this situation confined to the large estates, as will appear from the following specific cases reported to the committee:

Value of Estate	Number of states in which proceedings necessary
$ 20,000.00	12
23,386.33	9
27,000.00	9
27,500.00	13
28,000.00	9
32,761.52	6
33,584.86	11
103,000.00	17

"The time required to obtain the necessary waivers ranges from several days in some of the states to many months in others. In most of the states an inventory of the entire estate is required. No proceedings can be commenced, therefore, until after the estate has been appraised. Because of the many serious delays, the Corporate Fiduciaries Association of New York City appointed a committee to attempt to work out a uniform method in obtaining waivers to expedite the transfer of securities of decedents whose estates were administered by members of the association. The committee wrote to each of the states inquiring whether the state would agree to issue waivers consenting to the immediate transfer of such securities

upon receipt of a cash deposit sufficient to cover the amount of the largest possible estimated tax. As indicative of the time taken to secure a waiver which should not require more than a few days at the most, and also as indicative of the lack of official appreciation of the importance of the time element in such transactions, the reply of one state official may be quoted: 'The entire proceeding (of securing waivers) in no event requires more than a month to complete, which is, as we are advised, quite extraordinary considering the delay occasioned in most other jurisdictions. For this reason we do not believe that it would be of any practical advantage in most cases that a cash deposit be forwarded before the tax is computed.'

"As the securities cannot be transferred until the tax waiver has been secured from each state which may claim a tax, executors are frequently prevented from taking advantage of a favorable market in the sale of the securities. These delays, therefore, are more than exasperating in that they frequently cause a material shrinkage in the assets of the estate. A few examples will illustrate the serious loss from this cause.

"In a recent Pennsylvania estate, inventoried at $53,000, tax proceedings were required in thirteen states other than the state of domicile, and more than six months elapsed between the death of the decedent and the receipt of the necessary waivers to execute the transfer. During this period of waiting there was a shrinkage in the value of the assets of the estate of about $8,500. The taxes on this estate amounted to $6,079.77, which together with the shrinkage caused by the tax proceedings, consumed approximately 30 per cent of the estate.

"In a California estate one item of stock alone declined in value $5,400 before tax waivers could be procured and a sale consummated.

"In a New York estate, after filing application for a waiver with another state from which it is comparatively easy to obtain waivers, the executors had an opportunity to sell the stock for immediate delivery for $44,000; by the time the waivers were received the offer had been withdrawn and the market had dropped to $38,000, a difference of $6,000.

"In another New York case stocks in a Delaware corporation which had property in Arizona were inventoried at $3,471.98; nearly three months were consumed in obtaining a waiver. In the meantime the market had dropped drastically and the total proceeds from the sale of the stock was only $63.65.

"These non-resident taxes also involve a tremendous economic waste. In a large percentage of the cases no tax whatever is due, although the filing of all of the necessary papers is required, and frequently the costs incident to the proceedings are far in excess of the tax. Ten states require court proceedings and in several it is necessary to employ a local attorney to conduct the proceedings. One state, until recently, required an ancillary administration and frequently the public administrator received a fee greater than the tax received by the state.

"The following specific cases are sufficient to illustrate the indefensible effects of these practices:

"In one New York estate containing securities of corporations of another state, with a par value of $25,500, inventoried as of the date of death at $6,912.50, and finally sold for $8,166.05, it was necessary to have this portion of the estate administered locally in the other state. The local administrator's fee and other expenses of the local administration amounted to $1,012.46, although the taxes paid to the state amounted only to $320.12. The total tax and costs, therefore, in that state alone took 16.31 per cent of the proceeds from the sale of the securities.

"An estate of $150,000 in the District of Columbia occupied almost the entire time of one person for three months to secure the necessary waivers and consents to the transfer of securities. The tax in one state on securities, which were valued at approximately $3,000, was $18. The cost of the tax proceedings in that state, however, was $230.

"In a Maryland estate six months and three days were required to secure the necessary consent to transfer the stock of one railroad. The cost of proceedings amounted to $65, although no tax was payable.

"In an Illinois estate the cost in connection with the determination of inheritance taxes in another state, amounting to $16.20, were $33.60; in a second Illinois

estate the cost of court proceedings in another state was $46.50 to determine a tax of $34.36; in a third Illinois estate the expenses in connection with the determination of a tax of $709.00 to another state were $204.50.

"In a New York estate the total tax in nine of the states in which waivers were required was 66 cents; the estimated cost of proceedings in obtaining these waivers was $250; in another the total tax paid to four states was $62.72, the estimated cost of proceedings, $125.00; in a third the total tax paid to six states was $259.31, the estimated cost of proceedings $175.00; in a fourth the total tax paid to ten states was $827.37, the estimated cost of proceedings $500.00.

"In a recent estate, in order to transfer stock of a railroad company which was incorporated in Maryland and Pennsylvania and maintained a transfer office in New York, although the market value of the stock was not more than $100 and the tax liability considerably less than a dollar, it was necessary to prepare and file three copies of the will, two of which had to be certified, three certified copies of the letters testamentary; two applications under oath for appraisal; six schedules setting forth assets and liabilities; a copy of the petition for letters; a copy of the executor's bond; an order of court; a resolution of the board of directors of the corporate executor; evidence of payment of the transfer taxes; an affidavit of no indebtedness in Pennsylvania; a Pennsylvania short certificate; a New York inheritance tax waiver, and a Pennsylvania inheritance tax waiver. When the costs and the time and labor of the executor are considered, it is exceedingly doubtful whether the value of the stock justified the trouble and expense of transfer.

"In a Kentucky estate, in order to transfer twelve shares of stock of a corporation chartered in another state, the market value of which was $10 per share, or $120, it was necessary to furnish certified copies of the will, settlements and inventories at a cost of $10 and to write thirty letters. A tax of $15 was assessed on the property, which, together with the cost, amounted to 21 per cent of the value of the property, which is now worthless.

"These unconscionable abuses are sufficient in themselves to bring condemnation upon the entire inheritance-tax system and are a reflection upon the intelligence and common sense of the American people. Any attempted solution of inheritance-tax problems, therefore, which does not eliminate the evils of non-resident taxation will be futile indeed." (Proceedings, pp. 40-7.)

"Intangible Personal Property Should be Taxed Only by the State of Domicile of the Decedent.

"The death taxes of each state, whether an estate tax or succession taxes are imposed, should apply to the following classes of property:

"1. When transferred by resident decedent—
  (a) Real property within the state.
  (b) Tangible personal property except that which has an actual *situs* outside the state.
  (c) Intangible personal property wherever located.

"2. When transferred by non-resident decedent—
  (a) Real property located within the state.
  (b) Tangible personal property having an actual *situs* within the state.

"As heretofore stated, real estate and tangible personal property can be taxed only by the state in which they have a physical *situs*. It is, therefore, in the case of intangible personal property that the difficulties arise. The committee is convinced that the only equitable and practicable rule is that which grants to the state of domicile the exclusive right to tax intangible property and takes away all right to tax intangible property of non-resident decedents.

"The foregoing is, in the opinion of the committee, the ideal arrangement. It is recognized, however, that many states may be reluctant to give up entirely and immediately the claim which they have previously exercised against the intangible property of non-residents. While the committee is firmly convinced that the taxation of such property is wrong in principle and should cease, it would suggest that those states which do not see their way to adopt this program in full should content themselves with a 2 per cent tax upon such property in accordance with the so-called Matthews plan as developed in New York, with a reciprocal provision

such as is now employed in Connecticut, Massachusetts, New York and Pennsylvania.

"Under the Matthews plan, a flat tax of 2 per cent is imposed upon all personal property within the jurisdiction of the state, belonging to a non-resident decedent. The tax is the same, regardless of the size of the decedent's gross estate and regardless of the relationship of the beneficiaries to whom the property passes. It is necessary, therefore, merely for an executor to file with the state authorities a statement under oath showing the amount of property within the state and the value thereof at the time of decedent's death. Upon the receipt of such a statement, the tax can immediately be determined, and upon payment of the tax a waiver can immediately be issued. No inventories, letters of administration, wills or other papers are required to be filed. The procedure is simple, direct and speedy. This method of assessing non-resident property, therefore, eliminates much of the inconvenience, expense and delay incident to the other methods in use.

"New York has developed this plan by adding an optional provision whereby an executor may report the assets and liabilities of the estate and pay a tax of 3 per cent upon the value of the property located in New York after deducting therefrom that proportion of deductions and exemptions which the value of the New York property bears to the value of the entire estate wherever situated. Under the Matthews plan, which allows no deductions whatever, insolvent estates have been required at times to pay taxes to transfer property which was located in a state other than that in which the decedent resided at the time of death. This injustice is eliminated by the New York optional provision. Notwithstanding the fact that the rate is higher and that far more detailed reports are required to be filed under this provision, it is an advantage to estates in which the debts and other obligations substantially reduce the gross assets.

"The reciprocal provision referred to provides that no tax is payable on the intangible personal property of a non-resident decedent if the decedent was a resident of a state or territory of the United States which at the time of the transfer does not tax the prop-

erty of decedents of the enacting state or has in its laws a reciprocal provision of similar intent." (Proceedings, pp. 48-50.)

These were the developments which lead up to the nation wide movement for reciprocity with respect to the imposition of death taxes on intangible personal property of non-resident decedents.

This movement is based upon two propositions, viz:

(a) That real property and tangible personal property should be taxed only on the basis of actual *situs*, and

(b) That intangible personal property should be considered as having a *situs* only at the domicile of the decedent and should be subjected to tax by the state of domicile alone.

It involves the enactment of laws by the several states whereby each state agrees not to tax intangible personal property of a decedent who was domiciled in another state if similar treatment is accorded by such state with respect to residents of the state enacting the law.

The effect is that one state death tax, and only one, is exacted with respect to intangible personalty, such tax being payable to the state of domicile of the deceased owner. Multiple state taxation of any property owned by a decedent is wholly eliminated.

New York was the first state to enact a reciprocal law (Chapter 143, Laws of 1925). Pennsylvania followed next and shortly afterwards was followed by Massachusetts and Connecticut.

The reciprocity principle applies not alone to states which have a reciprocal provision in their laws, but includes states which do not impose death taxes at all and states which impose death taxes but do not tax intangible personal property of non-resident decedents.

The growth of the reciprocity movement has been rapid and the reciprocal list now comprises twenty-one states and the District of Columbia, which are classified as follows:

(1) States which have enacted reciprocal laws: California, Connecticut, Illinois, Georgia, Maine (effective July 1, 1928), Maryland, New Hampshire, *New York, Ohio, Oregon, Pennsylvania.

(2) States which do not impose death taxes: Alabama, Florida, Nevada, District of Columbia.

(3) States which do not tax intangible personal property of non-resident decedents: Colorado, Delaware, Massachusetts (originally reciprocal), New Jersey, Rhode Island, Tennessee, Vermont.

It will be observed that while twenty-one is less than 50% in number of the states of the Union, nevertheless, the list includes most of the larger states, so that from the standpoint of wealth and population the percentage is much greater. Furthermore, the list includes most, if not all, of the states which have enjoyed popularity as states of incorporation for corporations.

---

*The New York reciprocal provision was rendered ineffective because of the decision of the Court of Appeals of that state in SMITH v. LOUGHMAN, 245 N. Y. 486, but a bill is now pending before the New York Legislature designed to reinstate the reciprocal principle and doubtless will be enacted before this case is decided.

The movement for reciprocity is still under way and has the active support and co-operation of the National Tax Association, The National Bankers Association and the National Association of Corporate Fiduciaries, of several State Bar Associations (including New York), of the United States Chamber of Commerce, and of many other organizations and individuals.

If the spread of the movement is not interfered with, it is fair to assume that within a few years more than 90% of the intangible personal property of decedents will be subject to taxation only by the state of domicile.

Should the decision of the court on either the major or minor question be to the effect that the State of Connecticut was without power to impose a death tax, it will deal a death blow to reciprocity, as it will strike at the very heart of the theory upon which it is based, namely, that all intangible personal property should be taxed by the state of domicile and only by the state of domicile.

The death of reciprocity and the undoing of the result of years of effort in that direction will not, however, be the sole result. The effect will be much deeper and far reaching, particularly if the major question should be answered in the negative. It will mean the complete breakdown of death taxation by the states of the Union as applied to intangible personal property. This may appear to be a very broad statement but it is not believed to be too broad and it is thought that the argument to follow will fully justify it.

Why will there be such a breakdown? Because it will be possible to remove bonds, notes and evidences of indebtedness to states which do not impose death taxes. A

few large safe deposit vaults in the State of Florida would hold all of the intangibles of this character in the entire United States. Residents of states which do impose death taxes would find no difficulty in arranging to have such intangibles kept in these vaults. Nor is it necessary to go to Florida. The same thing could be accomplished in the District of Columbia or in either of the States of Alabama or Nevada. Manifestly, it would no longer be possible to tax bonds, notes and evidences of indebtedness except, perhaps, in small amounts when owned by the citizen of moderate means who, because of lack of information or carelessness, might keep his securities at home. The wealthy citizen, best able to pay a death tax, would not hesitate to avail himself of an entirely lawful means of escape from liability.

Certificates for shares of stock would be in the same category as other securities. These shares if owned directly by the decedent might be taxed by the state of domicile of the corporation but taxation would be avoided by the formation of holding corporations under the laws of one of the states which does not have death taxes and the placing of legal title to the shares in such corporation. The owner when he died would own only the shares of the holding corporation and these would be non-taxable.

What about debts? It would, of course, be legally possible for a state to tax debts due from its residents, both persons and corporations, but while legally possible, as a practical matter, it would be impossible. Assume that the State of New York should undertake to tax deposits made by non-residents in its banks. New York is the financial center of the country. Nearby are other states which would not hesitate to bid for this banking business by passing laws

exempting all deposits made in their banks from death taxes. The District of Columbia or Florida would perhaps be the beneficiaries. Intangible wealth is liquid. It flows readily in economic channels and will, of course, find its way to those places where, because of taxing laws or otherwise, the return may be enhanced and the effect of obnoxious laws evaded. Residents of New York would shun New York banks for by keeping their funds on deposit elsewhere death taxes could be avoided. New York would find itself in the same predicament that confronted it some years ago when it did tax debts due from its residents. There was a change in the money current and New York banks were unable to compete with banks of other states in securing deposits. New York would be compelled now as then to forego death taxes upon debts due from its residents and this class of intangible personal property would escape taxation entirely. New York has been used as an illustration because of its banking pre-eminence but what has been said would be equally true of other states.

There would be no class of intangible personal property that could not find a wide open road to tax evasion and the ultimate result could only be that such efforts as might be made to tax such property would prove futile and in the end the states would find themselves compelled to cease their efforts to impose death taxes thereon. It would not be possible to maintain an adequate and rational system of death taxation in the United States.

What has been said would apply equally if the minor question should be answered in the negative, except that the result would be to exempt only such bonds and other securities as might be classified as tangible property for death tax purposes.

The jurisdiction of domicile is the only one which is in position to secure the information necessary to levy a tax upon a decedent's intangibles and to enforce such a tax. Intangibles are readily concealed and transported. If within the jurisdiction of a state at the time of a decedent's death, they may be readily spirited out of that jurisdiction before the tax levy can be made effective and without administration in such jurisdiction. Rarely does it happen that administration can be avoided in the state of domicile for it is there that the decedent ordinarily has his real property and tangible personal property, and it is there that his personal representatives must submit themselves to the jurisdiction of the probate court.

Most states would not be benefited by a negative answer to either the major or minor questions if it would be possible to effectively tax all of a decedent's intangibles at some place, for reciprocity has already gone a long ways towards eliminating multiple taxation and the expense, inconvenience and delay incident thereto.

In *Blackstone v. Miller,* 188 U. S. 189, 206, Mr. Justice Holmes said:

> "When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

Paraphrasing that statement, we think it should be said here:

> "When logic and the policy of a state coincide with a fiction due to historical tradition, the fiction must hold, especially where the fiction has always controlled and public policies of the utmost importance have developed around it."

The effect of a decision adverse to Connecticut's contentions upon the safe deposit business must be considered. Enormous deposits of securities of non-residents are now in the custody of New York safe deposit companies and New York makes no effort to subject such securities to tax upon the death of the owner, being content that they should be subject to the authority of the state of domicile. Should the state of domicile be denied the right to tax, New York would be confronted with the same alternatives as in the case of bank deposits. To levy a tax would drive the bulk of the business from the state and do serious injury to business interests, whereas to continue the exemption from tax would mean that no tax whatsoever would be imposed.

Taxation is a highly practical science and it is being treated more and more in that light as the business of the nation becomes more diversified and intricate. Technicalities must not be permitted to prevail. We must pursue the substance and not the form. As a practical matter there can be no doubt but that death taxation of intangible personal property at the domicile of the decedent is indicated and there alone can it be applied and enforced with justice and with certainty. The practice of the states ever since death taxation was introduced into our state taxing systems and the decisions of state courts and of this court fully sustain taxation of intangibles at the domicile. As was said in *New York Trust Company v. Eisner*, 256 U. S. 345, 349:

> "Upon this point a page of history is worth a volume of logic."

The situation is much the same as was considered in *Southern Pacific Company v. Kentucky*, 222 U. S. 63. It was there held that Kentucky might impose a general property tax on ocean going steamers owned by a Kentucky cor-

poration on the ground that such steamers had a *situs* in Kentucky inasmuch as they did not have an actual *situs* elsewhere. The decision rested solely upon the *mobilia sequuntur personam* maxim because there is no port in Kentucky to which the steamers might come and they could never be physically in that state. There is greater reason to apply the maxim in the case of the intangibles here under consideration. Although the steamers had no actual *situs* anywhere, it was certain that in no event could they have one in Kentucky. Intangibles have no actual *situs,* not for the same reason, but because they have no physical existence. They do not constitute wealth in the sense the word is understood by economists but are merely an ownership of a right to receive something. If not evidenced by paper writings, there is nothing of substance connected with them. If so evidenced, it is possible for the paper writings to be taken to the state of domicile. In the very nature of things intangibles can have no actual *situs* in the sense that real property and tangible personal property, *i. e.*, wealth, have. The *mobilia sequuntur personam* rule had its origin in the fact that personal property was readily moved from place to place and at first applied only to tangibles. By *a fortiori* reasoning, its application to intangibles is manifest.

Counsel for the executors cite cases in which a foreign state has refused to allow the use of its courts to collect death taxes imposed by the state of domicile as proof that the latter state has no right to impose a tax. In so doing, the imposition of a tax and its collection are confused. An example of these cases is *Colorado v. Harbeck,* 232 N. Y. 71. A careful reading of this case will fail to disclose any claim that Colorado did not have the right to levy the tax. It is true that it could not enforce it. The same might be true

in the case of a resident of Kentucky owning steamships which have no actual *situs* anywhere. If these were the only property of such a resident it might not be within the power of Kentucky to get its tax, but this would have no bearing upon its right to assess it. Nor could New York deny Colorado the right to tax inasmuch as New York has always based its resident tax on the theory that the *situs* of intangible personal property is at the owner's domicile.

Finally, it should be observed that if the *mobilia sequuntur personam* rule is to be abandoned for death tax purposes, it must be abandoned for general property tax purposes also. Conceivably, it might be retained for the death tax and abandoned for the general property tax, but the converse seems impossible. To deny the state of domicile the right to subject intangible personal property to the general property tax on the theory of its *situs* at the owner's domicile would produce chaos. Many of the states are still relying mainly upon the general property tax as the source of state revenues. Imperfect as it is as applied to personalty, nevertheless a material portion of state revenues is raised by the general property tax thereon. Personalty constitutes practically the only relief for real property. The fact that real property is now overburdened with taxes need only be alluded to. It represents the most vexatious problem in taxation today. If taxation of personalty on the basis of domicile is to be done away with, there will be an instant rush to put intangible personalty where the tax laws may not reach it. New York already constitutes a haven. It has modernized its tax system and has recognized income as well as wealth as a proper tax base. In taxing income it has seen fit to exempt intangible personal property from the general property tax. Its safe deposit

vaults will be found yawning wide for the bonds, notes and evidences of indebtedness of residents of the general property tax states. The only possible result would be a greatly increased burden upon realty, depreciation in the value thereof, and a general upsetting of economic conditions, the effect of which it is difficult to estimate.

POINT II.

United States Bonds and Treasury Certificates are not tangible personal property and may be subjected to a death tax at the domicile of the owner.

That the United States bonds and treasury certificates which the Connecticut Court held could not be taxed in Connecticut are in fact intangible personal property is recognized in the Court's opinion. It was said (R. p. 74): "The United States bonds and treasury certificates are strictly speaking mere evidences of debts and intangible personalty." Notwithstanding this, it was thought that certain decisions of this Court, particularly the *State Tax on Foreign-held Bonds* case, 15 Wall. 300, had given said bonds and certificates the character of tangible personal property and made necessary the application of the rule of *Frick v. Pennsylvania, supra,* under which tangible personal property may be taxed for death tax purposes only at the place where it has an actual *situs.*

In the first place, it will be observed that this decision was contradictory for the court held that bonds of a corporation which were situated exactly the same as the United States bonds and treasury certificates were subject to the Connecticut tax. Manifestly, there is no difference for death tax purposes between United States and corporate

bonds. If one is tangible personal property surely the other is.

Also, it will be noted that the statement in the opinion in the *Foreign-held Bonds* case upon which the court relied was *obiter,* pure and simple. In addition, that case involved a property tax, not a death tax. The question was whether Pennsylvania might tax interest on bonds of a domestic corporation held by non-residents of that state. United States bonds and state and municipal bonds were in no way involved.

Furthermore, the language on which the Connecticut court relied was wrenched from its surroundings and the words of the opinion which qualified that language were omitted.

The Connecticut Court quoted the following from the opinion:

> "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are."

This, in and of itself, is a qualified statement. It does not say that in every case and for every purpose actual *situs* will determine the right to tax, but it merely says that "in many cases" it will. There is nothing necessarily conflicting with a death tax at domicile.

Immediately following the above quotation it was said:

> "But other personal property, consisting of bonds, mortgages and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, are not separated from the possession of the owners."

This language shows clearly that the court was not considering death taxes for in *Wheeler v. Sohmer,* 233 U. S. 434, it has since been held that a state may tax mortgage notes on the basis of physical *situs.* The same rule, however, was not applied in the case of a general property tax on mortgage notes in *Buck v. Beach,* 206 U. S. 392. See also *Crosby v. Town of Charlestown,* 78 N. H. 39.

What we think the court said in the *Foreign-held Bonds* case was that certain classes of bonds, mortgages and debts could have no *situs* independent of the domicile of the owner but state and municipal bonds, in addition to their *situs* at the domicile of the owner, could have a *situs* elsewhere.

The Connecticut court cited *People v. Home Insurance Company,* 29 Cal. 533, to the effect that state bonds of California were held to be taxable in California as personal property of a non-resident. This case is not out of harmony with our construction of the *Foreign-held Bond* case. The bonds in question had a business *situs* in California, having been deposited as a condition of the right of the insurance company to do business in that state. As a matter of fact, California applies the *mobilia sequuntur personam* maxim in the taxation of personal property.

Matter of Estate of Fair, 128 Cal. 607;

Westinghouse Company v. Los Angeles, 188 Cal. 491;

Chambers v. Mumford, 187 Cal. 228;
Matter of Estate of McCahill, 171 Cal. 482;
Matter of Estate of Hodges, 170 Cal. 492.

The executors contend that the Connecticut court in holding United States bonds and treasury certificates to be tangible personal property was merely construing the laws of Connecticut and, for that reason, no question under the federal constitution is involved. The Connecticut court did not, however, base its decision that these items could not be taxed upon any construction of the laws of that state, but rested its decision wholly upon the doctrine enunciated by this court in *Frick v. Pennsylvania, supra.* It cannot be denied that the law of Connecticut is broad enough to tax the bonds and certificates, if that may be done in consonance with the Constitution of the United States. Therefore, even if the Connecticut court had construed the bonds and certificates to be tangible personal property under Connecticut law they would still be taxable if Connecticut had the power to tax them. So the question resolves itself into this: Were the bonds and certificates tangible personal property under the law of this court or under the law of the State of New York so as to bring them within the *Frick* case? The question of their status under the law of this court has been briefly argued under this point and in detail in the brief for the petitioner and defendant-in-error. It is not understood that any contention is made that they were tangible personal property under the laws of the State of New York, and no cases are cited which so hold. As a matter of fact, under New York law the bonds and treasury certificates are intangible personal property. This proposition is so elementary that it is difficult to cite cases to support it. There are, however, a number of cases in which bonds are treated as intangible, such as *People ex rel. Alpha*

Portland Cement Co. v. Knapp, 230 N. Y. 48, and the New York Tax Law (Laws 1920, Ch. 647, as amd.) in defining "intangible personal property" for general property tax purposes expressly includes "bonds" and "evidences of debt."

Respectfully submitted,

SETH T. COLE,
Counsel for Amici Curiæ,
Office and Postoffice Address,
Capitol, Albany, N. Y.

MAR 5
CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1927.

Nos. 189 and 191.

WILLIAM S. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT,

Petitioner,

vs.

ARTHUR SHERMAN, CHARLES MORRIS, JOSEPH PLAUT, *et al.*, Executors,

Respondents.

BRIEF OF AMICI CURIAE AND ON BEHALF OF ESTATE OF JAMES B. DUKE, DECEASED.

WILLIAM R. PERKINS,
SOL. H. STRAUSS,
FORREST HYDE,
Amici Curiae.

HARRY H. SHERIDAN,
Of Counsel.

Printed by Law Printing Service, 115 C. S. Reporting Inc., 69 Liberty Street, New York

CONTENTS.

	PAGE
Notice of Motion for Leave to File a Brief as Amici Curiae	1
Petition for Leave to File Brief as Amici Curiae	2
Statement of Case and Interest of Executors of Estate of James B. Duke, deceased	5
I. The issue is one of fact, not of law	6
II. Money in hand and on deposit, public securities, notes and bonds and certificates of stock are tangible within the purview of the Frick Case	10
III. The Universitas is now limited by actual situs whenever acquired	14
IV. Kirtland *v.* Hotchkiss (1879), 100 U. S. 491, and Fidelity & C. Trust Co. *v.* Louisville (1917), 245 U. S. 54, which is identical with and followed it, are not in point because of the very different kind of tax involved	16

Cases Cited.

PAGE

Blackstone *v.* Miller, 188 U. S. 189, 204, 205, 206 ..... 6, 7, 10, 12, 14, 15, 18

Buck *v.* Beach, 206 U. S. 392, 408 7

Bullen *v.* Wisconsin, 240 U. S. 625 ..... 7, 16

DeGanay *v.* Lederer, 250 U. S. 376, 381, 382..... 12, 18

Fidelity & C. Trust Co. *v.* Louisville, 245 U. S. 54, 58, 59 .....16, 17, 18

Frick *v.* Pennsylvania, 268 U. S. 473, 494..... 7, 8, 10, 14, 15, 16

Kirtland *v.* Hotchkiss, 100 U. S. 491, 499.....16, 17, 18

Liverpool Insurance Co. *v.* Assessors, 221 U. S. 346, 355 17

Mitchell *v.* Boyer, 160 App. Div. N. Y. 565 13

New Orleans *v.* Stempel, 175 U. S. 309, 318, 319, 321, 322 .....11, 14, 15, 17, 18

People *ex rel.* Hoyt *v.* The Commissioners of Taxes, 23 N. Y. 224, 228 8

People *ex rel.* Jefferson *v.* Smith, 88 N. Y. 576, 585 12

R. I. Hospital Trust Co. *v.* Doughton, 270 U. S. 69, 80 ..... 7, 15

Selliger *v.* Kentucky, 213 U. S. 200, 204 13

State Tax on Foreign Held Bonds, 15 Wall. 300, 321, 323, 324 ..... 10, 11, 16

Travis *v.* Knox Co., 215 N. Y. 259 13

PAGE

Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 203, 208 9

Wachovia Bank & Trust Co. *v.* Doughton, 272 U. S. 567, 576 ..... 7, 16

Wheeler *v.* Sohmer, 233 U. S. 434, 440, 446..... 7, 18

STATUTES CITED.

N. Y. Personal Property Law, Chapter 41, Section 162 13

Uniform Stock Transfer Act 13

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

Notice of Motion for Leave to File a Brief as Amici Curiae.

PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled suit, will move this Court at the opening of the Court on the 5th day of March, 1928, or as soon thereafter as counsel can be heard, for leave to file a brief as *amici curiae*, and for such other or further relief as may be proper.

New York, March 2, 1928.

WILLIAM R. PERKINS
SOL M. STROOCK
FORREST HYDE
Amici Curiae.

HARRY H. SHELTON,
of Counsel.

To:

ABRAHAM L. GUTMAN, Esq., and
KENNETH DAYTON, Esq.,
Attorneys for Taxpayer.

CHARLES EVANS HUGHES, Esq.,
Counsel for William N. Blodgett,
Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

Petition for Leave to File Brief as Amici Curiae.

The undersigned respectfully petition this honorable Court for leave to file a brief as *amici curiae* in the above entitled matter.

Your petitioners apply as counsel for the Executors of the Estate of James B. Duke, who died domiciled in the State of New Jersey on October 10, 1925. The decedent left a gross estate of more than $80,000,000.00, consisting of real estate, shares of stock in various corporations, public securities in coupon form payable to bearer, and consisting of Liberty Bonds, State, municipal and corporate bonds all in coupon form payable to bearer, bank accounts and currency. All of the public securities, corporate bonds, bank accounts and currency were acquired in the State of New York, were permanently located there prior to and at the time of decedent's death, and constituted part of the capital with which he carried on his business in that State. The State of New Jersey is attempting to include as a part of the

taxable estate within its jurisdiction such public securities, corporate bonds, bank accounts and currency, and to assess an inheritance tax upon the transfer thereof by his death.

Your petitioners' clients are vitally interested in the decisions on the questions involved in the above entitled suit.

Notice of this application having been served on counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

New York, March 2, 1928.

WILLIAM R. PERKINS
SOL M. STROOCK
FORREST HYDE
Amici Curiae.

HARRY H. SHELTON,
of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

BRIEF SUBMITTED ON BEHALF OF THE EXECUTORS OF THE ESTATE OF JAMES B. DUKE.

Statement.

The Executors of the Estate of James B. Duke file this brief *amici curiae* in opposition to the contention of the Petitioner that the State of Connecticut has the power to impose a succession tax on the transfer by will of a resident of that State of the ownership of the following classes of property which had their *situs* in the State of New York at the testator's death, namely:

(a) Bearer Liberty Bonds;
(b) Bearer Treasury Certificates;
(c) Cash (Coins and Bank Notes).

The Executors of James B. Duke, deceased, are vitally interested in this contention because of a similar

situation which has arisen in the administration of that estate. He died a resident of New Jersey. At that time and for many prior years he had had an office in New York City, and in that city he had acquired and kept a great many of his securities, consisting of bearer, State, municipal and corporate bonds. They had never been in the State of New Jersey, but had a permanent *situs* in New York. There were also the bank accounts he had continuously kept in New York City.

The question presented, therefore, is the same in the two cases, namely, whether the maxim *mobilia sequuntur personam* will be indulged to the extent of making taxable at the owner's domicil such items of personal property if they had acquired an actual *situs* in another state at the time of his death.

I.

The issue is one of fact, not of law.

There is nothing new in the concept that jurisdiction is necessary to taxation. The principle is old and has always been recognized. The difficulty has lain in determining when such jurisdiction existed.

A study of the cases shows that the path of progress here, as in many other branches of the law, has been from fiction to fact, from technicality to actuality, until today the law on this subject has been bottomed by this Court on the realities of the particular situation.

There was a time when the maxim *mobilia sequuntur personam* held full sway. And based on it there long persisted a distinction with respect to the kind of taxation involved.

In 1903 in *Blackstone* v. *Miller*, 188 U. S. 189, at page 204 the Court said: "No one doubts that succession to

a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there". It regretted "that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other hand, at the same time, according to the fiction that, in successions after death, *Mobilia sequuntur personam* and domicil governs the whole" but affirmed "these inconsistencies infringe no rule of constitutional law."

In 1907 in *Buck* v. *Beach*, 206 U. S. 392, 408, and again as late as 1914 in *Wheeler* v. *Sohmer*, 233 U. S. 434, 440, 446, this distinction between a property and a succession tax was prominent in the opinion of the court.

Today these fictions and distinctions, under the impulse of the excessive and unjust duplication of taxation to which they gave free rein, have largely become things of the past. *Jurisdiction is a question of fact. Therefore, taxability is a question of fact,* namely, has the particular asset acquired a *situs* distinct from the domicil of its owner. *Frick* v. *Pennsylvania* (1925), 268 U. S. 473; *R. I. Hospital Trust Co.* v. *Doughton* (1925), 270 U. S. 69, 80, and *Wachovia Bank & Trust Co.* v. *Doughton* (1926), 272 U. S. 567.

The technical barrier now being interposed by the states to the broad application of this sound, simple and salutary standard is the equally fictitious classification of personal property into tangible and intangible. And the argument for it is based on the fact that the *Frick Case* involved so-called tangibles only and the opinion in it states that *Blackstone* v. *Miller, supra,* and *Bullen* v. *Wisconsin* (1916), 240 U. S. 625 "related to intangible personalty, which has been regarded as on a different footing from tangible personalty" (268 U. S. at p. 494).

But we feel confident on the one hand that the items involved here are tangible within the purview of the *Frick Case,* if such be essential; and on the other hand that this Court intended, and has applied, the *Frick Case* as a limitation of the *universitas* whenever the asset involved has acquired an actual *situs* uncontrolled by mere terminology.

There can be no common sense or justice in the courts laying hold upon actual situs only to produce double taxation. There is no magic in the word tangible or intangible to require such an arbitrary result. It may be true that a particular item of property is of such a nature that it is incapable of acquiring an actual situs but it cannot be true that an item which has acquired an actual situs retains a fictitious situs at the same time for the purpose of tax jurisdiction. Actual situs should either be given its full consequence or none, else we have the courts doing the inconsistent thing of attributing diverse characters and locations to the same item of property at the very same time.

As long ago as 1861 the Court of Appeals of New York in *Hoyt* v. *The Commissioners of Taxes,* 23 N. Y. 224, truly expressed the situation in the following apt and striking language which is most pertinent here:

> "Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that

> other States and Governments have adopted the same rule. If then proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicil, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicil, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given." (p. 228).

This case has been often approved by this Court and portrays, in our opinion, the true situation and remedy. Thus in *Union Refrigerator Transit Co.* v. *Kentucky* (1905), 199 U. S. 194, the Court voiced the same view in the following language:

> "Most modern legislation upon the subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation, and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation." (p. 203).
>
> "'No fiction', says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law' (3 Bl. Com. 43). The opinion (in *People ex rel. Hoyt* v. *Tax & A. Com'rs.*, 23 N. Y. 224) argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the state where it is located." (p. 208, citing other cases to same effect).

II.

Money in hand and on deposit, public securities, notes and bonds and certificates of stock are tangible within the purview of the Frick Case.

With respect to money in hand and on deposit, sufficient authority is *Blackstone* v. *Miller* (1903), 188 U. S. 189, where this Court in holding that New York could impose a transfer tax on deposits of a non-resident decedent in the banks of that State, said:

> "The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Re Houdayer*, 150 N. Y. 37; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *City Nat. Bank* v. *Charles Baker Co.*, 180 Mass. 40, 42. In view of these cases and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank." (p. 205).

With respect to public securities, the law is settled as stated in the leading case of *State Tax on Foreign Held Bonds* (1873), 15 Wall. 300, where this Court said:

> "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicil of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of state bonds and

> bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicil of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages and debts generally, has no *situs* independent of the domicil of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners." (p. 323-4).

With respect to notes and bonds and certificates of stock the concluding sentence of the quotation last made has been distinctly qualified and it is now settled that such items are tangible property and not mere evidences of ownership.

Thus in *New Orleans* v. *Stempel* (1899), 175 U. S. 309, 322, this Court said:

> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."

And it remarked of the quotation we made above from the case of *State Tax on Foreign Held Bonds* (p. 321):

> "This last sentence, properly construed, is not to be taken as a denial of the power of the legis-

> lature to establish an independent *situs* for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their *situs* to be that of the domicil of the owner, a declaration which the legislature has no power to disturb *when in fact they are in his possession.*"

Again in *Blackstone* v. *Miller*, 188 U. S. 189, 206, the Court said:

> "There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300, *sub. Nom. Cleveland P. & A. R. Co.* v. *Pennsylvania*. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases. *Savings & L. Soc.* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320."

Finally in *De Ganay* v. *Lederer*, 250 U. S. 376, the Court on a very full consideration said at p. 381:

> "To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and Federal statutes they are often treated as property, not as mere evidences of the interest which they represent."

It quoted with approval from *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 576, 585, as follows:

> "'It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills, and notes have for many purposes come to be regarded as property, and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found, like other visible, tangible chattels.'"

and it concluded:

> "this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a *situs* at a place other than the domicil of the owner, and be there reached by the taxing authority * * * (citing cases). Shares of stock in national banks this Court has held, for the purpose of taxation, may be separated from the domicil of the owner, and taxed at the place where held. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490." (p. 382.)

In this connection it should be borne in mind that stock certificates are now negotiable by the Uniform Stock Transfer Act which has been adopted in a great number of the states, including New York (see Personal Property Law, Chap. 41, Sec. 162, *Travis* v. *Knox Co.*, 215 N. Y. 259, and *Mitchell* v. *Boyer*, 160 App. Div. N. Y. 565). This shows the trend of modern thought and legislation in treating such instruments as being property in and of themselves.

In *Selliger* v. *Kentucky* (1909), 213 U. S. 200, 204, this Court said of a like statute with respect to warehouse receipts:

> "We are dealing with German receipts, and therefore we are not called upon to consider the effect of statutes purporting to make such instruments negotiable. Bonds can be taxed where they

are permanently kept, because, by a notion going back to very early law, the obligation is, or originally was, inseparable from the paper or parchment which expressed it. Buck *v.* Beach, 206 U. S. 392, 403, 413. That case and the authorities cited by it show how far a similar notion has been applied to negotiable bills and notes. But a warehouse receipt does not depend upon any peculiar doctrine for its effect. A simple receipt merely imports that goods are in the hands of a certain kind of bailee."

III.

The Universitas is now limited by actual situs whenever acquired.

The crux of the *Frick Case* was the kind of tax imposed, not the property involved. The point of that decision was the limitation of the *universitas* by actual *situs*.

In 1899 in *New Orleans* v. *Stempel*, 175 U. S. 309, 318-9, this Court approved many state cases holding actual *situs* of notes to be a limitation on property taxation. Yet in 1903 in *Blackstone* v. *Miller*, 188 U. S. 189, 206, we find the court regretting that the same state at the same time might impose a succession tax on the one hand according to fact and on the other hand according to fiction on even tangible property.

This was the situation which the *Frick Case* remedied. It did so on the basis of actual *situs*. And thereby it brought succession taxation into harmony with property taxation in respect of jurisdiction. So while the *Frick Case* involved only tangibles so-called, we cannot believe that the Court did not really intend the relief to be as complete as the principle is broad, namely, as actual *situs* might be acquired for taxation. Any other conclu-

sion would be at once illogical, unnatural and unjust. And, in our opinion, subsequent decisions have so applied the *Frick Case.*

Thus in *R. I. Hospital Trust Co.* v. *Doughton* (1925), 270 U. S. 69, 80, in holding that North Carolina could not validly impose a transfer tax upon shares of stock owned by a non-resident in a New Jersey corporation although the corporation did business and had two-thirds of its property in that state, the Court said:

> "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock and bonds, *the situs of which is with the owner,* a transfer tax of course may be properly levied by the state in which he resides. So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents (citing cases)."

We call particular attention to the careful phrase of limitation which we have italicized because it seems a plain and broad adoption of *situs* as the real test of jurisdiction for transfer or property taxation. For the phrase would be entirely unnecessary if the Court meant such assets were always taxable at the owner's domicil regardless of *situs.* And if the Court did not mean the phrase to be a limitation to actual *situs* then the Court has abrogated the express qualification in *New Orleans* v. *Stempel,* 175 U. S. 309, 322, and again in *Blackstone* v. *Miller,* 188 U. S. 189, 206, of the similar language in

State Tax on Foreign Held Bonds, supra, to which we have already called the Court's attention (*ante,* pp. 11-12).

In *Wachovia Bank & Trust Co.* v. *Doughton* (1926), 272 U. S. 567, the Court held North Carolina could not impose a transfer tax on the exercise by will of a resident of that State of a power of appointment given by will of a resident of Massachusetts over securities held in Massachusetts upon a trust created by the latter will because the property was not within the jurisdiction of North Carolina; and Justices Holmes, Brandeis and Stone joined in a separate opinion by the former which concluded with this significant statement:

> "I dare say that it may be desirable to limit the universitas, as was done in *Frick* v. *Pennsylvania,* 268 U. S. 473, but I cannot help doubting whether the present decision can be reconciled with Bullen's Case." (p. 576).

This statement necessarily meant a limitation of the *universitas* to actual *situs* with respect to intangibles so-called. It occurred in a case involving no chattels and *Bullen's Case* involved no chattels and is one of the cases referred to in the *Frick Case* as showing intangibles had been regarded as on a different basis.

IV.

Kirtland v. Hotchkiss (1879), 100 U. S. 491, and Fidelity & C. Trust Co. v. Louisville (1917), 245 U. S. 54, which is identical with and followed it, are not in point because of the very different kind of tax involved.

In each the question was whether a state, in ascertaining the tax its residents should pay, could measure the tax by property (bonds in the former and bank deposits in the latter) in another State. And an affirmative an-

swer was given because the tax was upon the person in exercise of the power which a State has over its own citizens—a different case altogether.

This is apparent from the opinions and was the explanation given of *Kirtland* v. *Hotchkiss* in the subsequent cases of *New Orleans* v. *Stempel* (1899), 175 U. S. 309, 321 and *Liverpool Insurance Co.* v. *Assessors* (1911), 221 U. S. 346, 355 which, of course, likewise, apply to *Fidelity & C. Trust Co.* v. *Louisville.*

Thus in *Kirtland* v. *Hotchkiss* the conclusion of the Court was thus stated:

> "Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal Government cannot rightly interfere." (p. 499).

While in *Fidelity & C. Trust Co.* v. *Louisville* the Court said:

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed." (p. 58).

And in answer to the argument that debts situated beyond the taxing jurisdiction should be exempt the same as chattels, it remarked:

> "But this court has not attempted to press the principle so far, and there is opposed to it the

> long-established practice of considering the debts due to a man in determining his wealth at his domicil for the purposes of *this sort of tax.*" (p. 59).

The statement in *Kirtland* v. *Hotchkiss* that a "bond, wherever held or deposited, is at best only evidence of the debt, not the debt itself" was not necessary to the decision and must be regarded as overruled by the subsequent cases, such as *New Orleans* v. *Stempel, Blackstone* v. *Miller, Wheeler* v. *Sohmer* and *DeGanay* v. *Lederer,* clearly holding to the contrary and which have restricted *Kirtland* v. *Hotchkiss* to its exact point, namely, a tax by a state under its authority over the person of its citizen.

Respectfully submitted,

WILLIAM R. PERKINS,
SOL M. STROOCK,
FORREST HYDE,
Amici Curiae.

HARRY H. SHELTON,
of Counsel.